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Decisions May 81

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Editor, Monthly Report

HARRY FREEDMAN



ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1981] OLRB REP. MAY

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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2763-80-R; 2762-80-R United Food and Commercial Workers International Union, Local 1000A, Applicant, v. **Consumers Distributing Company Limited**, Respondent; and United Food and Commercial Workers International Union, Local 1000A, Applicant v. Jack Colden Ltd., Respondent, v. Group of Employees, Objectors

Trade Union – Trade Union Status – Previously certified union undergoing name change – Continuing predecessor’s constitution with minor changes – Whether it can rely on union status of predecessor

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Martin Levinson and Daniel Gilbert for the applicant; E. L. Stringer, Q.C. and Robert Weaver for the respondent.*

DECISION OF THE BOARD; May 20, 1981

1. This application for certification has been filed by the “United Food and Commercial Workers International Union, Local 1000A, Region 18 Canada”. The Registrar advised the applicant that on reviewing the application, it appears from a check of the Board’s files that the Board had not found in any previous proceeding that the applicant has been found to be a trade union within the meaning of section 1(1)(n) of the Act. The applicant was further advised that if this information was correct, it must be prepared at the hearing scheduled for this matter to satisfy the Board in accordance with its usual practice that its organization is a trade union within the meaning of section 1(1)(n) of the Act.

2. At the hearing, the applicant called evidence with respect to the issue of whether the applicant is a trade union within the meaning of section 1(1)(n) of the Act. The Board then entertained argument from the parties with respect to this issue.

3. During the hearing the applicant informed the Board that its correct name was the “United Food and Commercial Workers International Union, Local 1000A” and requested that the Board make this amendment. Having regard to the representations before it, the name “United Food and Commercial Workers International Union, Local 1000A, Region 18 Canada” appearing in the style of cause as the name of the applicant is amended to read: “United Food and Commercial Workers International Union, Local 1000A”.

4. Daniel Gilbert gave evidence that he is the president of the United Food and Commercial Workers International Union, Local 1000A and that he had previously been the president of the Union of Canadian Retail Employees, Local 1000. He testified that the new Local 1000A is the same local as before and that the purpose of amendments before the Board was to redraft and update the constitution. Mr. Gilbert informed the Board that this involved a change in name. In cross-examination, Mr. Gilbert testified that the constitution of the Union of Canadian Retail Employees Union, Local 1000, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America was the constitution for the applicant. Various documents were filed in evidence. The minutes of a Board of Directors’ meeting on September 16, 1980, indicate that there was a review of the constitution and by-laws and that the following changes were approved:

PROPOSED AMENDMENTS TO THE CONSTITUTION

Amend "Union of Canadian Retail Employees, Local No. 1000, Chartered by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC" to "United Food and Commercial Workers International Union, Local No. 1000A, Region 18, Canada".

Page 1, #1 – Name – "This organization shall be known as "Local Union No. 1000, a Local Union of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC" (hereinafter called the Local Union)."

Amend to head: "This organization shall be known as "Local Union No. 1000A, a Local Union of the United Food and Commercial Workers International Union, AFL-CIO-CLC" (hereinafter called the Local Union)."

5. The minutes of the Fall Convention of the Union of Canadian Retail Employees, Local 1000A, held in Toronto on October 20, 21 and 22, 1980, indicate that the constitutional amendments proposed by the Board of Directors were reviewed in detail and that the following amendment was adopted:

Amend "Union of Canadian Retail Employees, Local No. 1000, chartered by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC" to "United Food and Commercial Workers International Union, Local No. 1000A, Region 18 Canada".

Page 1, #1 – Name – This organization shall be known as "Local Union No. 1000, a Local Union of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC", (hereinafter called the "Local Union").

Amend to read: This organization shall be known as "Local Union No. 1000A, a Local Union of the United Food and Commercial Workers International Union, AFL-CIO-CLC" (hereinafter called the "Local Union").

6. In a letter to the applicant dated January 27, 1981, the International President of the United Food & Commercial Workers International Union, AFL-CIO-CLC wrote to its Local 1000A and approved of certain proposed amendments to the by-laws of Local No. 1000A. The letter states, in part:

Cover

The cover is approved as follows: "United Food and Commercial Workers Union, Local No. 1000A, Region 18, Canada."

Name

1. This Section is approved as follows: "This organization shall be

knowns as “United Food and Commercial Workers Union, Local No. 1000A”, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC.”

7. There was also produced in evidence a document which bears the description of “Constitution and By-Laws of Union of Canadian Retail Employees Local No. 1000 chartered by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, CLC”.

8. In *More Groceteria Limited*, [1980] OLRB Rep. April 486, the Board found that by virtue of a merger between the Retail Clerks International Union and the Amalgamated Meat Cutters and Butcher Workmen of North America, the Union of Canadian Retail Employees, Local 1000A was the successor of the Union of Canadian Retail Employees, Local 1000 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America. It is the position of the applicant that its present description is merely the result of a change in name and that it is the same entity as the Union of Canadian Retail Employees, Local No. 1000. As such, it appears to the Board that the applicant is relying upon a presumption of status under section 94 of the Act. In order for the applicant to be entitled to such a presumption of status under section 94, it is necessary for the applicant to show that it is the same entity (and not a new entity) as the entity which has previously been found to be a trade union.

9. The evidence before the Board establishes that the applicant continued the constitution of the Union of Canadian Retail Employees Local No. 1000 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO, CLC subject only to very minor amendments. The Board is satisfied that the applicant has continued the constitutional continuity of its predecessor and has thereby not lost the essential characteristics which were possessed by the predecessor. See *The Spectator*, [1974] OLRB Rep. April 235 and *Coca-Cola Ltd.*, [1975] OLRB Rep. Nov. 862. In Board File No. 0993-79-R, the Board has previously found the United Food and Commercial Workers International Union, AFL-CIO-CLC, to be a trade union within the meaning of section 1(1)(n) of the Act and in the instant application the present description of the applicant is merely the result of a change in name of an entity which has previously been found to be a trade union by the Board. The Board finds that the applicant’s name is as set forth in the style of cause and that the words “Region 18 Canada” are not part of the applicant’s name. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.

10. In this application for certification the applicant and the respondent are in dispute as to the status of persons who are classified by the respondent as assistant managers and management trainees. The respondent maintains that assistant managers and management trainees exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*. The Board accordingly appoints a Labour Relations Officer to inquire into and report to the Board on the duties and responsibilities of the persons who are classified by the respondent as assistant managers and management trainees.

11. The applicant and the respondent are otherwise in agreement with respect to appropriate bargaining units.

12. The Board is satisfied that the ultimate determination with respect to the status of the persons in dispute does not affect the applicant’s entitlement to certification. The Board is satisfied that regardless of its determination with respect to the persons in dispute more than

fifty-five per cent of the employees of the respondent in the bargaining units at the time the application was made, were members of the applicant on March 30, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Accordingly, the Board certifies the applicant under the provisions of section 6(1a) of the Act as the bargaining agent for all employees of the respondent in its stores in Mississauga, save and except store managers, assistant manager, management trainees and persons above the rank of store manager, assistant manager and management trainee, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period pending the final resolution of the composition of the bargaining unit. The Board further certifies the applicant under the provisions of section 6(1a) of the Act as the bargaining agent for all employees of the respondent at its stores in Mississauga who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except store managers, assistant managers, management trainees, and persons above the rank of store manager, assistant manager and management trainee pending the final resolution of the composition of the bargaining unit.

13. The issuance of certificates must await an agreement of the parties or a determination by the Board with respect to the status of the assistant managers and the management trainees.

1826-80-R; 2705-80-U United Brotherhood of Carpenters and Joiners of America, Local 2679, Applicant, v. **Contempoform Incorporated** and CTF Construction Ltd., CTF Contracting, Respondents and CTF Construction Ltd., Re Carpenters Union, Local 2679

Discharge for Union Activity – Related Employer – Section 79 – Whether respondents one employer – Whether grievor discharged for union activity

BEFORE: R.O. MacDowell, Vice-Chairman, and Board Members B. Armstrong and F.W. Murray.

APPEARANCES: *F. Rotter and W. Oliveira for the applicant; A. Torchia and J. Gallo for the respondents.*

DECISION OF THE BOARD; May 21, 1981

1. This is an application under section 1(4) of *The Labour Relations Act* which was heard together with a section 79 complaint involving the same parties. The respondents, in both cases, were Contempoform Incorporated and an entity which was variously described in the evidence as CTF Construction Ltd., CTF Contracting, and CTF Contracting Ltd. It appears that the correct corporate name of the respondent is CTF Construction Ltd. but, for

reasons which will become apparent *infra*, the Board hereby adds CTF Contracting as a party respondent in the section 1(4) proceeding.

2. The respondents have filed no reply in either of these matters. The section 1(4) application was filed on November 20, 1980. The Board has already fixed two previous hearing dates in that matter, and on neither occasion did the respondents appear — although duly notified of both the proceeding, and the obligation to adduce evidence pursuant to section 1(5) of the Act. It appears that the respondents have simply disregarded the entire proceeding. While the Board was of the view that the respondents would benefit from a serious consideration of their position, and further that, had they done so earlier, this litigation might have been avoided, in view of the delay already occasioned, and the prejudice to the applicant/complainant, we did not think this proceeding should be delayed further. In consequence, the Board did not accede to the respondent's request (made part way through the presentation of their case) to adjourn so they could seek a solicitor's advice.

3. The section 79 complaint concerns the termination of one Frank Basso, who was discharged on or about March 3, 1981. The union contends that Mr. Basso was discharged because of his trade union activity contrary to sections 56, 58(a) and 61 of *The Labour Relations Act*. The section 1(4) application involves the union's contention that Contempoform Incorporated, CTF Construction Ltd. and CTF Contracting are one employer for the purposes of the Act. Section 1(4) reads as follows:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

It will be convenient to deal first with the related employer issue; then consider the merits of the unfair labour practice complaint.

4. Contempoform Incorporated is a small wood-working shop engaged in the manufacture and installation of prefabricated store fixtures, office furniture and institutional and commercial interiors. The company has a small factory and warehouse at 5 Kenhar Drive in Toronto, and employs four or five shop employees. John Gallo is the company's owner and general manager.

5. CTF Construction Limited ("CTF") was described as a general contractor, engaged on a small scale, in all phases of construction — including walls, partitions, roof work, plumbing, electrical, mechanical and so on. John Gallo is a fifty per cent owner and an officer of CTF. The other "partner" in the business is Angelo Torchia who is the president of the company and (through his wife) effectively controls the other fifty per cent of the shares. Torchia has no ownership interest in Contempoform, but is employed as a salesman and occasional site supervisor when Contempoform is engaged in the on-site installation of its products (i.e. counters, cabinets, etc.) Some fifty to sixty per cent of Contempoform's business

is linked to CTF. Contempoform acts as the carpentry subcontractor for any projects in which CTF is engaged.

6. Prior to the summer of 1980, Contempoform had acted as a subcontractor for other general contractors but its functions had been restricted to the fabrication and installation of wood structures. In the summer of 1980, Torchia and Gallo began to discuss the possibility of developing a general contracting business. As Torchia explained it, he and Gallo decided to become "their own" general contractor, which would continue to maintain a carpentry subcontracting relationship with Contempoform. CTF Construction Ltd., the corporate vehicle through which this activity was to be pursued, was incorporated on or about October 23, 1980.

7. The Board heard a considerable amount of evidence concerning the relationship between Contempoform and CTF, and the circumstances surrounding the discharge of Frank Basso. Much of this evidence was contradictory. Having regard to the manner in which the various witnesses gave their evidence, the Board prefers the evidence of Frank Basso and Walter Oliveira wherever it is in conflict with that of John Gallo or Angelo Torchia.

8. There is no doubt that Contempoform and CTF are engaged in associated or related activities or businesses carried on under common control or direction. We have already mentioned the functional relationship between the two firms and the key role played by Gallo in each. We might also note that Torchia plays at least a limited managerial role with respect to the on-site employees of Contempoform. Although it was contended by the respondents that the employees were working for CTF when they were installing the fixtures made by Contempoform, Frank Basso, the only employees who gave evidence, testified that he considered himself to be working for Contempoform whether in the shop or on the side. He had never been told he was working for a different company and it was admitted that there were no separate pay cheques issued by CTF for the installation work. The Contempoform employees continue to perform the installation work and be paid by that company as they were before CTF came into existence. Torchia testified that there was an invoicing or "charge back" relationship (which was not elaborated), and that CTF would occasionally transfer money to Contempoform so that salaries would be covered. Torchia told the Board he considered it irrelevant which bank account was actually used.

9. CTF has no office staff or equipment of its own. The operations of CTF are conducted from the offices of Contempoform at 5 Kenhar Drive. There is only one telephone number for both businesses. The only sign identifying the premises is that of Contempoform. The Contempoform secretary does the clerical work for both companies, and we do not think that the similarity between the name ConTempoForm and CTF is merely a coincidence as the respondents contended.

10. The union's bargaining rights are based upon a collective agreement entered into on September 26, 1980, and signed by John Gallo. This form of agreement is commonly known as a "shop" or "plant" agreement, and must be distinguished from the general construction industry agreements between the carpenters' union and various construction contractors. The "shop agreement" applies to about twenty-six wood-working shops in the Metropolitan Toronto area. Articles 2 and 3 of that agreement, when read together, clearly indicate the scope of the union's bargaining rights and the type of work which the agreement is intended to cover:

Article 2 — Area covered by Agreement

2.01 This Agreement shall apply to all manufacturing of Store Fixtures and Display Units, performed by the Employer in its plant and/ or plants in the following area:

“Counties of Halton, Peel, Ontario and York which includes the area known as Metropolitan Toronto”.

Article 3 — Recognition and Relationship

3.01 The union is recognized as the sole exclusive bargaining agent for the employees in the bargaining unit described as follows:

“All employees of the Employer, save and except non-working foremen, persons above the rank of non-working foremen, and the office and sales staff”.

In addition, article 21 of the collective agreement permits an employer to use some of its own “shop employees” to install “on-site” the prefabricated wood structures which the firm has contracted to produce.

11. The collective agreement on which the union bases its bargaining rights does not bear the name of either Contempoform or CTF Construction Ltd. The name of the “employer” appearing on the agreement is “CTF Contracting”. Thus, if one looks only at the collective agreement, it appears that the union has bargaining rights for neither Contempoform nor CTF, but rather a non-existent or unincorporated entity known as “CTF Contracting”. The reason for this apparent anomaly was much disputed; but we prefer the version of events given by Walter Oliveira.

12. In or about September 1980, Contempoform, which was then a non-union subcontractor, was engaged in installing counters in a Canada Trust Building then under construction in Mississauga. This project was a “union job” — that is, the contractual arrangements between the general and prime subcontractors required that all work be done by union members or unionized subcontractors. Such arrangements are common in the construction industry but posed a problem for Contempoform which at that time was not “unionized”. To resolve this problem, John Gallo approached the carpenters’ union to establish the necessary contractual relationship. At this point in time, CTF Construction Ltd. did not exist as a separate legal entity.

13. When Walter Oliveira, a business agent for the union, was contacted early in September, he delivered two copies of the shop agreement for Gallo’s consideration. This agreement, as we have already noted, is the standard agreement which is in general use in the Toronto area. Even a cursory glance at the first page reveals its nature, and we simply cannot accept Gallo’s assertion that he had no idea that the agreement applied to his plant employees. Moreover, this was not the first time that Mr. Gallo had had a relationship with a trade union. Some years ago, he had been associated with a company called “Domus” which was also a wood-working shop and was bound by an earlier version of the same shop agreement. Oliveira testified, and we accept, that he made it clear to Gallo that the agreement applied to both the

shop and installation work, and that it was not unlike the agreement by which Domus had been bound two or three years before.

14. The collective agreement was executed on September 26, 1980, and as we have already mentioned bore the name "CTF Contracting". Oliveira asked Gallo why he was not using the name "Contempoform" — the name in which the shop and the installation work had traditionally been done, and the only name appearing on the sign on the premises. Gallo assured Oliveira that CTF Contracting and Contempoform were "the same thing", and when asked to affix an appropriate corporate seal, told Oliveira that the business had recently moved and that the corporate seal had been misplaced. There was no suggestion that CTF Contracting was a separate business or entity — as it probably was not at that time since CTF was not incorporated until almost a month later.

15. Following the execution of the collective agreement, Oliveira spoke to the employees in the shop to outline the benefits established in the collective agreement. There was no indication from Gallo that the agreement did not apply to shop work or was restricted to installation, nor was there any indication that the installation phase of the business would henceforth be done by CTF. As far as the employees were concerned, they worked for, and were paid by, Contempoform. Subsequently, the union received membership dues and health and welfare payments in respect of the Contempoform employees, paid by cheque over the signature of Gallo and bearing the contempoform Incorporated name. It was only in or about January 1981, that the union became aware of Contempoform's position that it did not have to apply the terms of the agreement to its shop employees, and that when the employees were doing on-site installation work, they were doing it as employees of CTF rather than Contempoform.

16. It was this dispute concerning the role of the union in Contempoform, and the company's obligation to pay the benefits established in the collective agreement, which led to Frank Basso's discharge. Basso took the view, (not unreasonably in the circumstances) that the company was obligated to abide by the collective agreement. His "mistake" was in expressing that view to the company and contacting the union to see what might be done. Gallo was quite candid with the Board in admitting that he was concerned and annoyed that, as he put it, Basso was always "talking about the union", or talking about his "rights". On or about March 3, 1981, Gallo received a letter designating Basso as the local shop steward. Basso was fired on the same day and it is difficult to accept that his was merely a coincidence. Basso had worked for Contempoform for over a year, had been hired by Gallo, and had been previously employed by other businesses with which Gallo was associated. There were no serious complaints about his work, yet Gallo told the Board that Basso was fired because his work was unsatisfactory. This is not what Gallo told Basso at the time of his discharge. Basso was told that there was no work for him because the firm was short of jobs — yet subsequently some of the employees were working overtime, and Gallo admitted offering to re-employ Basso if he was prepared to work with no union at a lower wage.

17. On the basis of the evidence before us, the Board is satisfied that Frank Basso was discharged from employment at Contempoform by reason of his trade union activity contrary to sections 56, 58(a) and (c) and 61 of *The Labour Relations Act*. The Board therefore directs that:

- (a) Frank Basso be reinstated in employment forthwith;

- (b) Frank Basso be compensated for all wages and benefits lost by reason of the unlawful discharge, and that the monetary compensation payable to him shall include interest calculated in the manner set out by the Board in *Hallowell House* [1980] OLRB Rep. Jan. 35.

Furthermore, in order to dispel the chilling effect which Basso's discharge may have on other members of the union in Contempoform's employ, the Board hereby directs that the respondent Contempoform post copies of the attached notice marked "Appendix", after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

18. With respect to section 1(4) application, we have already reviewed the factual basis for declaring that Contempoform and CTF are "one employer". John Gallo is a principal in both; the two firms are functionally interrelated; there is an interchange of employees in respect of installation work; and the firms share the same premises, telephone, office equipment and staff. Nevertheless, section 1(4) gives the Board a discretion to "grant such relief by way of declaration or otherwise as it may deem appropriate". In the present case, however, we see no reason why we should not exercise our discretion to grant the declaration sought by the applicant. At the time the collective agreement was signed, Contempoform was the only legal entity to which it could have applied. CTF Construction Ltd. had not yet been incorporated. If CTF Contracting was a trading name, it was a trading name for Contempoform. The only employees involved were employees of Contempoform. The only work in question was being performed by Contempoform and its employees. The terms of the shop agreement could only be applied to the kind of work done by Contempoform. And Gallo told the union that Contempoform and CTF Contracting were the same thing. The purpose of section 1(4) is to protect a union's bargaining rights from erosion if an employer chooses to carry on all or part of its business or functions through a separate corporate vehicle. In this case, those bargaining rights attach to the manufacture and installation of prefabricated wood structures, and should continue regardless of whether those activities are carried out through Contempoform or CTF.

19. Accordingly, the Board declares that Contempoform Incorporated, CTF Contracting and CTF Construction Ltd. are one employer and that all three are therefore bound by the "shop agreement" entered into on September 26, 1980. We wish to make it clear however that the effect of this declaration is to be limited to binding these corporate entities to the shop agreement and does not extend the union's bargaining rights to the general contracting activities in which CTF Construction Ltd. might be engaged from time to time. In our view, the union is entitled to bargaining rights in respect of manufacturing and on-site installation of prefabricated wood structures, whether that activity is being performed by Contempoform, CTF Contracting or CTF Construction Ltd. This is the basis on which the agreement was entered into, and which the union could reasonably expect to be honored. We do not think the union could expect, nor do we intend this declaration to extend, bargaining rights for other activities of CTF Construction Limited. With this qualification, therefore, the Board hereby declares Contempoform Incorporated, CTF Contracting, and CTF Construction Ltd. to be one employer, and in consequence, Contempoform has been bound by the shop agreement since it was first executed, and CTF Construction Ltd. has been bound by it since it (CTF) came into existence as a separate corporate entity.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP,
THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE LAWFUL RIGHTS THAT ALL
EMPLOYEES ENJOY,

WE WILL NOT DISCRIMINATE AGAINST ANY EMPLOYEES FOR PARTICIPATING IN
THE LAWFUL ACTIVITIES OF THE TRADE UNION.

WE WILL OFFER TO RE-INSTATE FRANK PASSO TO HIS FORMER POSITION, AND SHALL
COMPENSATE HIM FOR ANY EARNINGS HE LOST AS A RESULT OF HIS DISCHARGE, PLUS INTEREST.

CONTEMPOFORM INC.

PER: _____
JOHN GALLO

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0034-81-U International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #637, Complainant, v. **Coulter Copper & Brass Limited** and Arthur Andersen Inc. as interim receiver of Coulter Copper & Brass Limited, Respondents

Collective Agreement – Duty to Bargain in Good Faith – Section 79 – Memorandum of settlement subject to ratification by principals – Employer going into receivership under *Bankruptcy Act* – Refusing to sign collective agreement – Whether breach of section 14 – Whether collective agreement existed without employer's formal signature

BEFORE: D. E. Franks, Vice-Chairman, and Board Members C. A. Ballentine and T. G. Armstrong.

APPEARANCES: *Chris G. Paliare and Jon McManus for the complainant; Michael Gordon, Marshall Sone and Michael Coulter for the respondents; Gordon Stewart for Tri-Canada Inc.*

DECISION OF THE BOARD; May 19, 1981

1. This is a complaint under section 79 of *The Labour Relations Act* alleging a violation of section 14. The respondent named in the original complaint is Coulter Copper & Brass Limited (hereinafter referred to as "Coulter"). Prior to the hearing in this matter there was filed in this application an intervention in Form 35a by Arthur Andersen Inc. which was appointed an interim receiver by order of the Supreme Court of Ontario dated March 10, 1981 pursuant to a proposal made under *The Bankruptcy Act* over the assets of the respondent Coulter. Also filed was an intervention by Tri-Canada Inc. a company which has an option agreement with Arthur Andersen Inc. with respect to the purchase of certain assets held by the interim receiver. Also filed in this matter was a reply by Michael Coulter "on his own behalf but not on behalf of the respondent Coulter". After some preliminary discussions with counsel it was agreed that Tri-Canada Inc. was not a party to these proceedings and that the respondent should be named as "Arthur Andersen Inc. as interim receiver of Coulter Copper & Brass Limited." Further, it should be noted that no objection was taken by the parties to the jurisdiction of this Board to proceed with this matter notwithstanding the proceedings under *The Bankruptcy Act*.

2. In the course of the hearing the problem of the indentity of the respondent re-emerged. Counsel for the complainant asked the Board to include "Coulter Copper & Brass Limited" as well as "Arthur Andersen Inc. interim receiver of Coulter Copper & Brass Limited" as party respondent to this application. It should be noted that prior to this point no reply had been filed by "Coulter Copper & Brass Limited." After a short recess Mr. Gordon entered an appearance on behalf of Coulter Copper & Brass Limited and tendered as the reply for that respondent the reply filed by Michael Coulter personally. Mr. Gordon explained that he had done so on instructions from Arthur Andersen Inc. subject to the condition that in the event that the Board found any liability or damages payable by Coulter Copper & Brass Limited in the present matter the liability having occurred prior to the proposal being filed on

9th, and the order of the Court appointing Arthur Andersen Inc. on March 10th, there would be no finding of liability on the part of Arthur Andersen Inc. for events occurring prior to that date. Accordingly, both "Coulter Copper & Brass Limited" and "Arthur Andersen Inc. as interim receiver of Coulter Copper & Brass Limited" are respondents in the present matter.

3. Except for one minor detail, the facts giving rise to this application are not in dispute. The complainant trade union and Coulter were parties to a collective agreement which expired at the end of December 1980. Bargaining for the renewal of that collective agreement had taken place on December 22, 1980 and January 8, 1981. On February 11, 1981, the complainant and the respondent Coulter met with a Conciliation Officer and concluded a Memorandum of Settlement. That Memorandum of Settlement was filed as Exhibit 2 in these proceedings and resolves all issues in dispute between the parties. It is signed by a representative of the complainant and Mr. Coulter on behalf of the respondent Coulter. It is subject to ratification by both parties.

4. The evidence of Mr. Malanson, the chief steward for the union in the plant was that the union conducted a ratification vote on February 12, 1981 and after that vote was conducted he informed the plant superintendent Al Peterson that it had been ratified by the union. The evidence of Mr. Coulter conflicts with this. His evidence is that he was not told by the chief steward Mr. Malanson that the agreement had been ratified until February 24th. Nothing turns on this discrepancy in the evidence although we are prepared to believe Mr. Coulter's version of the facts over Mr. Malanson's version. We therefore take it as fact that on February 24, 1981 the trade union informed Coulter that the Memorandum of Settlement had been ratified by the trade union.

5. Shortly thereafter in the words of Mr. Michael Coulter, "the bank pulled the plug on his business." He was forced to lay off his employees on February 26th. On March 9th a proposal was made pursuant to *The Bankruptcy Act* and on March 10th the Supreme Court of Ontario appointed an interim receiver being Arthur Andersen Inc.

6. It appears that shortly after the interim receiver was appointed a representative of the complainant union Mr. Jon MacManus attended upon Mr. Coulter at his office with a collective agreement reflecting the changes to the previous agreement resulting from the Memorandum of Settlement of February 11th. At this point Mr. Michael Coulter informed Mr. McManus that he had been instructed by Mr. Sone of Arthur Andersen Inc. that he had no power to sign anything on behalf of Coulter after the Court order of March 10th. As a consequence, from that date to the present, the formal document reflecting the agreement arrived at in the Minutes of Settlement of February 11th remains unsigned.

7. The complainant in this matter alleges that the refusal on the part of the respondents to sign the formal document which was tendered as Exhibit 4 in these proceedings constitutes a violation of section 14 of the Act. The complainant argues that all issues in dispute were resolved by the parties and that all that remains to be done is for the document incorporating the agreement between the parties to be signed. The complainant argues that on the evidence of Mr. Coulter once the union communicated its ratification of the agreement to the employer on February 24th there was in effect on that day a collective agreement between the parties. The remedy asked for by the complainant, therefore, simply reflects the existence of that collective agreement.

8. The respondent argues that the Memorandum of Settlement is not a collective

agreement and that settlement was never ratified by Mr. Coulter. The respondent argues further that in effect there has been no violation of section 14 because on the one hand Coulter was until March 10th prepared to sign any formal document reflecting the terms of the Memorandum of Settlement. After the Court order of March 10th the interim receiver could not sign the agreement without creating a fraudulent preference in favour of the employees over the creditors of Coulter Copper & Brass Limited. The respondent further argues that in the absence of an intention to violate section 14 the Board has no power to make any remedial order and further that if the Board contemplated making any order the Board should recognize the supremacy of *The Bankruptcy Act* as a federal statute and not interfere with the operations of the interim receiver appointed on March 10, 1981.

9. We are of the view that as of February 24, 1981, when the union clearly communicated to Mr. Coulter that it had ratified the Memorandum of Settlement, a collective agreement existed between the complainant and the respondent Coulter Copper & Brass Limited. Mr. Coulter's evidence was that ratification by the employer occurred when the formal collective agreement was signed. We cannot accept this interpretation of the Memorandum of Settlement. The Memorandum of Settlement is in a standard format used by conciliation officers. The heading reads as follows:

"MEMORANDUM OF SETTLEMENT"

Between:

‘Coulter Copper and Brass Co. Ltd.’

and

‘Brotherhood of Boilermakers Local 637’

The undersigned representatives of both the Company and the Union agree to the following basis of settlement of all matters in dispute as witnessed by the undersigned Conciliation Officer of the Ministry of Labour and agree to recommend its acceptance unanimously to their principals for ratification.

1. The term of the collective agreement shall be from Jan. 1 , 1981 to December 31 , 1981.
2. All matters previously settled and agreed to by the parties prior to conciliation shall be incorporated.
3. ...”

At the bottom it is signed by Michael Coulter as “employer”. Since it is clear that Michael Coulter was his own “principal” in what sense must it be further ratified by Coulter Copper and Brass Limited? Michael Coulter could not subsequently *refuse* to ratify after having agreed to recommend to himself “its acceptance unanimously” when he signed the Memorandum of Settlement. In short, his signature on the Memorandum of Settlement can only mean that he also, in fact, ratified the settlement at that time. This is consistent with Michael Coulter's evidence that he was prepared to sign the collective agreement (as a formal

document) whenever it was presented to him by the union. We are therefore of the view that ratification by the employer occurred when he signed the Memorandum of Settlement on behalf of Coulter Copper & Brass Limited. The Board has in the past held that a Memorandum of Settlement can become a collective agreement between the parties. (See, *Windsor Tube and Metal Inc.*, [1978] OLRB Rep. Sept. 882. In the present case, the Memorandum of Settlement became a collective agreement when the employer was notified by the trade union that the trade union had ratified the settlement. We therefore declare that as of February 24, 1981, there existed a collective agreement between the complainant and the respondent Coulter Copper & Brass Limited.

10. The complainant has requested the Board to issue an order such as that issued by the Board in the case of *The Municipality of Casimir, Jennings and Appleby*, [1978] OLRB Rep. June 507. In that case the Board held that the refusal to sign the formal collective agreement where nothing was left in dispute between the parties was of itself a violation of section 14 of *The Labour Relations Act*. The complainant's case in the present instance is even stronger. We are of the view that there already exists a collective agreement between the complainant and the respondent and all that remains is the formal engrossing of a document reflecting the Memorandum of Settlement. This refusal to execute such a document, constitutes a violation of section 14 of the Act.

11. The relief requested by the complainant in this matter is as follows:

1. A declaration that the Respondent employer has violated *The Labour Relations Act*.
2. A finding that the Respondent employer has breached its duty to bargain in good faith contrary to the Section 14 of *The Labour Relations Act*.
3. A declaration that the Respondent Employer is bound by a collective agreement.
4. A mandatory order directing the Respondent employer to sign the collective agreement, the terms of which had been agreed to on February 11, 1981.

As noted in paragraph 1 and 2 above, there are two respondents to the present application, Coulter Copper & Brass Limited and Arthur Andersen Inc. as interim receiver of Coulter Copper & Brass Limited. Further, it is clear that Arthur Andersen Inc.'s interest in this matter dates solely from March 10th. We have, however, found that as of the 24th of February there existed a collective agreement between the complainant and the respondent Coulter Copper & Brass Limited.

12. In his evidence, Mr. Marshall Sone, a representative of Arthur Andersen Inc., indicated that he had instructed Mr. Michael Coulter that he could not sign on behalf of Coulter Copper & Brass Limited after March 10th, and further that Mr. Sone would not sign a collective agreement if it created a preference in favour of the employees over the other creditors of Coulter Copper & Brass Limited. We are prepared to issue an order directing the respondents to sign the collective agreement, however, we leave it to Mr. Sone to determine his obligations as interim receiver under *The Bankruptcy Act*.

13. In view of the fact that the employees affected by this application were indefinitely laid off on February 26, 1981, we are of the view that this is not a case where the normal Notice of Employees should be posted. We, therefore, order as follows:

1. The respondent have breached their duty to bargain in good faith contrary to section 14 of *The Labour Relations Act*.
 2. The Board declares that the respondent Coulter Copper & Brass Limited is bound by a collective agreement from February 24, 1981 as set out in Exhibit #4 in this complaint.
 3. The Board orders the respondents to sign the collective agreement, the terms of which had been agreed to on February 11, 1981 in the Memorandum of Settlement filed with this Board and given effect in the form of agreement filed as Exhibit #4 in this complaint.
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1608-78-R The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, Applicant, v. Ontario Erectors Association v. Ferro Erectors (Toronto) Limited v. **Ferro Structural Steel (Toronto) Limited**, Respondents.

Related Employer – Union having knowledge of existence of separate employers – Failing to act with due dispatch-Declaration having result of binding employer to province-wide agreement-Whether Board exercising discretion to make related employer declaration

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members B. Joyce and M. J. Fenwick.

APPEARANCES: *James Hayes, Allan MacIsaac, Stan Arsenault, James MacDonald and Shalom Schachter for the applicant; R.A. Werry, J. Salamon and J. Collier for the respondents.*

DECISION OF THE BOARD; May 5, 1981

1. This is an application under section 1(4) of the Act. The Ironworkers District Council of Ontario and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 have applied to the Board under section 1(4) of the Act for a declaration that Ferro Structural Steel (Toronto) Limited (hereinafter referred to as “F.S.S.”) is bound by the province wide collective agreement between the Ontario Erectors Association, on the one hand, and the Ironworkers District Council and Ironworkers Locals 700, 721, 736, 759, 765 and 786 on the other.

2. Section 1(4) of the Act reads as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council or trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

3. The applicants allege that two companies, F.S.S. and Ferro Erectors (Toronto) Limited (hereinafter referred to as "F.E.") are associated or related businesses under common control or direction within the meaning of section 1(4) of the Act and ask that the Board exercise its discretion to declare that they constitute one employer for the purposes of the Act.

4. At the outset the parties asked the Board to bifurcate the proceedings. Before presenting evidence and argument on the issue of the exercise of the Board's discretion under section 1(4) of the Act, the parties asked the Board to determine the preliminary question of whether F.E. and F.S.S. are associated or related activities or businesses carried on under common control or direction. By a decision dated May 22, 1979 the Board found that they were. At p. 2 of the decision the Board said,

Counsel for the company conceded that Ferro Erectors and Ferro Structural Steel are under common control or direction. The agreed statement of facts submitted by the parties establishes that Both Ferro Structural Steel and Ferro Erectors are to varying degrees, directly or indirectly engaged in the steel erection business. Moreover, the agreed statement of fact indicates that Ferro Structural Steel from time to time sub-contracts erection work to Ferro Erectors.

Having regard to the agreed statement of fact in its entirety and most particularly the matters set out above, the Board is of the view that the activities of Ferro Erectors and Ferro Structural Steel are "associated or related business or activities" within the meaning of section 1(4).

5. The Board then convened a hearing to determine whether it should exercise its discretion and grant the declaration sought by the union which would bind F.S.S. to the above mentioned province-wide collective agreement. Through article 2.7 of the agreement the employer agrees not to sub-contract any work covered by the agreement to anyone who is not in a contractual relationship with the International Association of Bridge, Structural and Ornamental Ironworkers or any of its locals.

6. Mr. Julius Salamon is the president and owner of both F.E. and F.S.S. F.E. became bound by a collective agreement with the Ironworkers in 1964 and has been continuously bound since through successor agreements. F.S.S. has not been organized by a union. F.E. was incorporated in 1964; F.S.S. started its operation in 1962. From its beginning F.E. has been in the steel erection business. It has never engaged in the manufacturing of structural steel

members. F.S.S., on the other hand, is and always has been in the business of both manufacturing the structural steel members as well as frequently assuming responsibility for the erection of the steel it supplies through sub-contracting arrangements. F.S.S. has never used any of its own employees to perform steel erection work. To that extent F.S.S. does not itself perform work that would otherwise be performed by F.E. It does, however, control the sub-contracting arrangements which it has in the past entered into both with F.E. and other steel erection companies. No employees of F.E. have ever worked for F.S.S. or vice versa.

7. Salamon testified that F.S.S. bids on small or medium size jobs which might typically involve a small office, warehouse or school. Most of them are within a fifty mile radius of Metropolitan Toronto. When F.S.S. bids on a job, Salamon testified, they provide three prices: the supply of steel only, both the supply and erection of the steel in circumstances where they would pay non-union wages and the supply and erection of steel in circumstances where they would pay union wages. When they become the successful bidder they use union sub-contractors for the steel erection work when the agreement they enter into with the general contractor or job owner indicates that union labour should be used on the project. Normally, when there is no such stipulation, F.S.S. sub-contracts the erection work to a non-union sub-contracting company. In no circumstances do they do the steel erection work themselves. Where a supply and erection bid is accepted they always sub-contract the steel erection work. Salamon testified that by far the greatest percentage of sub-contracting arrangements made by F.S.S. for the erection of structural steel is to non-union sub-contractors. Through the years, about one quarter of F.S.S.'s subcontracts have been made with unionized sub-contractors.

8. Salamon testified that F.S.S. has been subcontracting to both union and non-union sub-contractors from its inception in 1962. Up until 1970 when F.S.S. needed a unionized steel erection sub-contractor they would use F.E. or another unionized steel erector. F.E. virtually ceased doing business in 1970, however. Between 1970 and date of filing of this application, F.E. was awarded the subcontract by F.S.S. on only two jobs, one in 1971 and another in 1977. Salamon testified that in or about 1970 F.S.S. decided to no longer award its sub-contracts to F.E. because F.E. was no longer competitive. Thereafter when a particular project required union labour F.S.S. would sub-contract to some other unionized steel erecting sub-contractor. According to Salamon, F.E., in contrast to F.S.S., never entered directly into contractual arrangements with general contractors. Instead it would be engaged by a sub-contractor like F.S.S.. In further contrast to F.S.S., F.E. did not itself submit bids for projects.

9. Although F.S.S. has never been unionized or bound by the collective agreement between the Ontario Erectors Association and the Ironworkers its name, rather than the name of F.E., was mistakenly included in the 1977-1978 collective agreement as a member of the O.E.A. The same mistake was repeated in the 1978-1980 collective agreement. Salamon testified that prior to these proceedings he had been unaware of this error. Following the discovery, though, F.S.S. met with the Ironworkers, Local 721 and officials of the O.E.A. at which time the O.E.A. accepted responsibility for the error. The union did not argue that the listing of F.S.S. in the collective agreement was caused by anything other than an unfortunate mistake.

10. To decide in any given case whether to exercise its discretion and grant a declaration under section 1(4) of the Act the Board considers to what extent the mischief that section 1(4) was designed to redress (that is, the wrongful erosion of a union's bargaining rights) has been created by the circumstances before it. The union has a legitimate interest in preventing the

dissipation of its bargaining rights through the activities of a company related to the one for which it holds bargaining rights. The company also has an interest, however, in knowing with some certainty within a reasonable time how it may run its operation. To balance the various interests involved, the Board will decline to exercise its discretion and grant a declaration under section 1(4) of the Act if the union does not act with sufficient dispatch to protect its bargaining rights. In *H. Allaire and Sons Company Limited* [1974] OLRB Rep. July 457, for example, the Board at p. 460 said,

The prime question which must be answered by the Board is whether or not the Board should exercise its discretionary power under section 1(4) in a case of this kind. The power given to the Board to treat two corporations as constituting one employer is a discretionary power. The particular circumstances in each case must be weighed. Certain tests must apply and certain vital questions must be answered. For instance, has the applicant sought to have the Board exercise its discretionary power within a reasonable period of time after knowing of the existence of two corporations who are closely associated in their activities or business? Is the applicant attempting to disturb any existing collective bargaining relationship? Has the applicant been unsuccessful in its prior attempts to obtain bargaining rights through the normal process of certification?

...

... Surely there is an onus on an applicant union, being aware of the circumstances over a period of years, to seek relief from the Board within a reasonable period of time.

See also *Harold R. Stark Limited* [1978] OLRB Rep. Oct. 945; *D.L. Stephens Contracting Niagara Limited* [1978] OLRB Rep. June 531; *Ellwall and Sons Contracting Limited* [1978] OLRB Rep. June 535.

11. In requiring the union to act with due diligence the Board is mindful that it would be inappropriate to place an excessively high standard on the union. In *The Great Atlantic & Pacific Company of Canada Limited and A & P Drug Mart Limited*, [1981] OLRB Rep. Mar. 285 the Board at pp. 12-13 said,

The respondents contend that the union should have been aware earlier of the separate corporate existence of A & P Drug Mart Limited and should have made its 1(4) application earlier. In the respondents' submission, the union's unreasonable delay in discovering and acting upon that fact should now deprive it of the remedy available under section 1(4). The Board cannot accept that contention. The circumstances were such that the union could not reasonably have been aware that two or three employees of the more than five thousand which it represents were not being treated in accordance with the collective agreement, and immediately upon the union becoming so aware it filed grievances to protect its position. There may be no legal requirement for a company to advise a trade union about a related company which might affect the union's bargaining rights, and there may be no requirement that a company which intends to rely upon "the corporate veil" as a

defence to a grievance should disclose that defence, however, it is inconsistent, in our view, for a company to take the position that the union “ought to have known” of these matters, when in response to the grievance, the Company itself did not clearly notify the union of the facts. Indeed, the presence in the Act of section 1(5) (creating an onus upon the respondents to reveal the corporate connection between them) suggests a legislative recognition that an applicant trade union generally will not be aware of the business or corporate relationships between the allegedly related businesses. In view of this explicit legislative direction, we do not think that we should adopt an unduly high standard of “due diligence”, or readily apply such concept to bar a union which had no *actual* knowledge of the basis on which a section 1(4) application might be made. It will be noted that section 1(4) itself does not expressly contemplate any such bar.

The reality of trade union organization — as illustrated by the applicant in this case — also suggest that the Board should not exercise its discretion to create an unreasonably high standard of due diligence. A union’s resources are not unlimited, and this limitation must be considered in assessing how quickly a union should become aware of, investigate and respond to, situations which might call for the application of section 1(4). . . . The Board must be careful lest it imposes upon them a standard of “due diligence” which is entirely unrealistic in the actual circumstances as they exist — especially when the respondents asserting that the union “should have known” or “acquiesced in the erosion of its bargaining rights”, will usually have taken no steps to advise the union of the situation, and will usually have benefited (as in the present case) from the lower schedule of wages payable to employees not covered by a collective agreement. We have carefully considered the cases referred to by counsel for the respondents (see *Industrial Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029, *Inducon Construction of Canada Limited*, [1975] OLRB Rep. April 399, *H. Allaire & Sons Company Limited*, [1974] OLRB Rep. July 457, *D.L. Stevens Contracting Limited* [1978] OLRB Rep. June 531, *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535, *Zaff Constuction Limited*, [1977] OLRB Rep. Nov. 741, *Farquhar Construction Limited*, [1978] OLRB Rep. Oct 915, *Harold R. Stark*, [1978] OLRB Rep. Oct. 945, *Acto Builders Limited* [1979] OLRB Rep. June 465, and *Metrus Contracting Limited*, [1979] OLRB Rep. Oct. 1009), but in our view the principle espoused in these cases amounts to no more than this: if a trade union has actual knowledge that a related company is undermining its bargaining rights or the union is wilfully blind to this act and, without cause, fails to seek remedy under section 1(4) within a reasonable period of time, the Board may exercise its discretion not to make a 1(4) declaration.

12. Concerning the timeliness of this application counsel for the company argues that the applicants had an obligation to bring their application under section 1(4) of the Act when they first learned of the existence of F.S.S. and not simply when they discovered that F.S.S.

was sub-contracting to non-union sub-contractors. Additionally counsel argues that the evidence demonstrates that one of the other locals of the Ironworkers, Local 736, whose jurisdiction covers the Hamilton area and who is part of the Ironworkers District Council, one of the applicants, has for years had clear knowledge that F.S.S. has sub-contracted to non-union erecting companies and has done nothing about it. Counsel emphasized that the collective agreement to which the applicants want the Board to declare that F.S.S. is bound is a province-wide agreement. He argues that it would be inappropriate for the Board to enable Local 721 to receive a declaration that would bind F.S.S. province-wide, thereby benefiting Local 736, when Local 736 because of its more obvious delay could not receive the declaration itself.

13. Mr. James MacDonald has been a full time business agent with the Ironworkers, Local 721 since 1974. He testified that he did not suspect that F.S.S. was sub-contracting to non-unionized steel erection companies until 1977 or approximately one and one half years prior to the filing of this application. Although the evidence establishes that F.S.S. had subcontracted steel erection work to a considerable number of non-union steel erection companies within the jurisdiction of Local 721, MacDonald stated his view that these were mostly outside of Toronto and on small jobs such that the union would not have readily become aware of them. The first time he actually discovered F.S.S. engaging the services of a non-union erection company, however, was in March, 1978 while they were on the Earls court school job. He discussed the matter with Mr. Salamon and the work was completed with a unionized erecting company. MacDonald testified that on this and other occasions he was given assurances by Salamon that whenever F.S.S. had a contract for both the supply and erection of steel they always used a union erecting company. MacDonald testified that through Salamon's assurances he was led to believe that F.S.S. was bound by the O.E.A. agreement. Salamon's recollection of his exchange with MacDonald over the Earls court school job was somewhat different. Salamon testified that when he was approached by MacDonald about the job he told MacDonald that F.S.S. was not then, and never had been, bound by the O.E.A. collective agreement with Local 721 but that it was F.E. that was bound. Salamon testified that MacDonald responded that as far as he was concerned F.S.S. and F.E. were the same company. More generally, Salamon testified that he at no time told MacDonald that F.S.S. was unionized or a member of the O.E.A.

14. Two months later, in May 1978 another problem arose over a job at Nashdene Yard. MacDonald discovered a non-union erecting company on the job and learned from the general contractor's superintendent on the site that F.S.S. had the sub-contract for both supply and erection. Once again MacDonald called Salamon. Both Salamon and ultimately the president of the general contractor told MacDonald, however, that F.S.S. had the sub-contract for the supply of the steel only and thus no control over who performed the erection work. Although MacDonald testified that he didn't believe that F.S.S.'s contract was limited to supply only, he did not take action against F.S.S. or commence a section 1(4) application at the time.

15. Seven months later, however, in December 1978 MacDonald filed two grievances against F.S.S. for engaging non-union erection companies on two other jobs allegedly in violation of the O.E.A. collective agreement. Towards the end of December the applicants filed the instant application under section 1(4) of *The Labour Relations Act*.

16. It is clear on the evidence that as far back as 1964 MacDonald knew of the existence

of two separate Ferro companies. He knew from that time that F.E. was in the business of erecting steel and he knew that F.S.S. was in the business of fabricating the structural steel and contracting out the erection work. It is not surprising that MacDonald would have been aware of this corporate structure as he was employed by F.E. as a foreman from 1964 to 1965. He was there at the actual time when or immediately after F.E. entered into a collective agreement with the Ironworkers in 1964. At that time F.S.S. was in operation and, the Board concludes on the evidence, was contracting out the steel erection work both to F.E. and other steel erection companies, both union and non-union. Mr. Stanley Arsenault, another business agent with Local 721 also indicated he had been aware, over the years, that F.S.S. did not directly employ ironworkers but rather engaged sub-contractors for steel erection work.

17. If Local 721 had been concerned about preventing F.S.S. from sub-contracting any work to non-union erection companies, it could have come to the Board anytime after section 1(4) was introduced into the legislation in 1971. The Board is satisfied that for many years Local 721 has either known or ought to have known that F.S.S. was not organized and was not itself bound by the O.E.A. agreement which up until 1977 listed only F.E. and not F.S.S. as one of the O.E.A. members. They had reason to know therefore that their bargaining rights were limited to F.E. and did not cover F.S.S. even when it sub-contracted steel erection work.

18. It appears from the evidence that Local 721 was generally not concerned with F.S.S. because F.S.S. always in fact did sub-contract to unionized steel erection companies when the owner of the project or general contractor was either legally required, or felt under an obligation, to sub-contract to union companies. As Arsenault put it, up until 1977 they always considered that F.S.S. was a "fair" contractor.

19. On the basis of all the evidence the Board concludes that this is not a situation where it should grant a declaration under section 1(4). For the reasons canvassed above the Board is satisfied that Local 721 either knew or ought to have known prior to 1977 that F.S.S. was not bound by the O.E.A. collective agreement and was not therefore itself under a legal duty to sub-contract only to organized erection companies. In an effort to bind F.S.S. to the O.E.A. agreement they could have applied under section 1(4) of the Act well prior to 1977. Furthermore, according to MacDonald, he first suspected that F.S.S. was sub-contracting to non-union erectors in 1977. This was confirmed to him in March of 1978. Two months later the union again thought that F.S.S. had been responsible for sub-contracting to a non-union steel erection company although this was denied by F.S.S. and the general contractor of the job in question. No action was taken, however, for another seven and one half months when the union encountered two more problems. Additionally it would appear on the evidence that Ironworkers Local 736 a member of the District Council, one of the applicants, would have had for a considerable length of time clear knowledge of F.S.S.'s practice of sub-contracting to non-union contractors and would not, therefore, on its own, be entitled to a declaration under section 1(4). Giving a declaration to Local 721, however, would encompass the jurisdiction of Local 736 as it would have the effect of binding F.S.S. to what is now a province-wide agreement. In some circumstances this may be appropriate. In all of the circumstances of this case, however, the Board declines to exercise its discretion to grant the applicants a declaration under section 1(4) of the Act.

2040-80-U United Steelworkers of America, Complainant, v. Fotomat Canada Limited, Respondent.

Charges – Section 79 – Previous Board order reinstating striking employees – Employer requiring completion of retraining programme as condition of returning – Treating refusals of retraining as resignations – Whether employer actions prompted by anti-union motives

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members C. A. Ballentine and J. Wilson.

APPEARANCES: *James Hayes, William Mills and Michael Bowman for the complainant; Stephen McCormack, Brock Myles and Marlene Hallett for the respondent.*

DECISION OF THE BOARD; May 25, 1981

1. This is a complaint filed under section 79 of *The Labour Relations Act* in which the complainant alleges violations of sections 56, 58 and 61 of the Act.

2. This complaint deals with the treatment afforded to a number of strikers represented by the complainant trade union who returned to work on or about December 1, 1980 pursuant to a Board order. In a decision dated October 24, 1980 the Board found that the respondent company violated section 14 of the Act in that it failed to bargain in good faith and make every reasonable effort to enter into a collective agreement. The Board found that as a result of the respondent's unlawful activity the complainant's bargaining power to seek the reinstatement of its striking members had been eroded. The time provided under section 64 of the Act within which a striking employee's right to return to work is protected had elapsed so that the return to work of the employees was conditional upon the bargaining power of the complainant trade union. In these circumstances the Board concluded that if it did not provide in its remedial order for the return to work of the striking employees the result would be to reward the employer for his unlawful actions. The result would also have been to leave the complainant trade union and its striking members in a disadvantaged position. Accordingly, the respondent was directed to re-submit to the complainant, as the basis for bargaining, an offer of settlement which had been made to the complainant and then unlawfully withdrawn. The respondent was also ordered to reinstate any striking employee who made an unconditional application for employment by December 1, 1980.

3. The complainant filed a fresh complaint dated December 16, 1980 alleging non-compliance with both parts of the above-described order issued by the Board on October 24, 1980. The Board severed the two aspects of the complaint and, in a decision dated February 13, 1981 dealing with the bargaining conduct of the respondent, found that Part IV of "the respondent's offer of December 3, 1980 was unlawful and is to be severed from the rest of its offer of that date." Under Part IV of its offer the respondent made the other parts of its offer conditional upon acceptance by the employees in a ratification vote conducted pursuant to section 34d of the Act. The trade union accepted all other terms of the offer but the respondent nevertheless insisted on the necessity of a ratification vote. In the face of the union's acceptance of all of the substantive terms of the employer's offer the Board, in finding a further violation of section 14 and violations of sections 56 and 58 as well, commented that the purpose of the respondent's bargaining stance of December 3, 1980 was "to provide an opportunity to the respondent's employees to reject their bargaining agent and undermine the

very basis to collective bargaining.” The Board directed the respondent to execute collective agreements incorporating all matters agreed to on December 3, 1980 for all certified bargaining units.

4. The second aspect of the union’s December 16th complaint, the matter with which we are seized, deals with the treatment afforded to the striking employees who returned to work pursuant to the Board’s order dated October 24, 1980. The union alleges that the return to work arrangements implemented by the respondent failed to comply with the Board’s order and were designed to provoke a response from the strikers which would provide the respondent with an excuse to terminate their employment.

5. By letter dated Wednesday, November 26, 1980, the complainant union advised the company of the names of the 62 striking employees who were making an unconditional application to return to work pursuant to the Board’s order of October 24, 1980. These employees had been on strike for a period of 14 months. Each was employed within one of sixteen bargaining units for which the complainant had been certified as bargaining agent. These bargaining units are located in Metropolitan Toronto, Scugog, Oshawa, Newcastle, Peterborough, Markham, Trenton, Belleville, Oakville, Port Hope, Lindsay, Caledon, Ajax, Brantford and Barrie. The company operated its photofinishing and photographic equipment retailing business during the course of the strike by use of strike replacements who worked from the company’s retail outlets in the locations referred to above. The bulk of the company’s work force, both strikers and strike replacements, is female.

6. By telegram dated Friday, November 28, 1980 the respondent advised each of the striking employees who made an unconditional application to return to work to report to the company’s Warden Avenue office in Metropolitan Toronto at 9:00 a.m. on Monday, December 1, 1980. When asked to explain the short notice, Mrs. Marlene Hallett, the company’s administrative supervisor, testified that the company understood the Board’s October 24, 1980 order as requiring it to physically return to work by December 1, 1980 those persons who made application pursuant to the Board’s order. Forty-seven employees reported as directed. However, the affected employees did not receive the notice to report until late Friday afternoon or evening so that many of those required to travel to Toronto had to make arrangements (babysitting, banking etc.) on short notice.

7. On Monday, December 1, 1980 the returning employees were met by Mrs. Hallett. They were directed to a waiting bus for transportation to a nearby Holiday Inn. Once the returning employees were seated in the hotel meeting room Mrs. Hallett, who was accompanied by Mrs. Marg Quinn, an assistant, welcomed them back to the company. The scene which followed has been accurately described by Mrs. Hallett in her evidence. The employees were loud and raucous and made derogatory remarks about herself and the company. Some of the returning employees were heard to comment that they were still on strike. When she announced that each employee was required to complete a questionnaire (eliciting general information) Mr. Rick Bigelow, who assumed a leadership role on behalf of the returning employees, directed the employees not to sign. He left the room but upon his return informed those present that the questionnaire could be completed. Each employee was individually called to a table at the front of the room for this purpose. Immediately after lunch Mr. Hallett announced that a four-day training course would commence the next morning and that travel time would be paid to those coming from outside Toronto. The announcement caused a “general disgruntlement” which culminated with the walkout of those present. It is

Mrs. Hallett's uncontradicted evidence that she told those who were present that there was work for them and that if they wanted to come to work to "just sign the time card".

8. Mrs. Hallett testified that she was relieved that the meeting was over and pleased at the outcome. She testified that she thought she had received a mass resignation from 47 employees who would have had to have been placed in stores and would have displaced employees who were there and, in her opinion, doing a good job. Mrs. Marg Quinn echoed Mrs. Hallett's sentiments in this regard. The company had informed the strike replacements by correspondence which preceded the Board's October 24th order that their employment was secure. Mrs. Hallett immediately reported the "mass resignation" to her immediate supervisor, Mr. J. Gillespie.

9. Fifteen of the returning employees appeared at the Holiday Inn on Tuesday, December 2nd prepared to commence the training programme. Two others were engaged in negotiations with the company. None of the others reported for training on Tuesday, December 1, 1980 and, with one exception they did not advise the company that they would be absent. However, fifteen of the employees who had reported on the Monday, but had failed to appear on the Tuesday, reported for training on Wednesday, December 3, 1980. The company adopted the position that these employees had resigned their employment and refused to allow any of them to take part in the training programme. Two others who failed to appear on Tuesday called the company and a third appeared at the company's offices on Wednesday, December 2nd. The company took the same position with respect to the employment status of these employees as it had with those who, although absent on Tuesday, December 2nd, had reported for training Wednesday December 3rd. Three of the employees who had attended on both the Monday and Tuesday and were in attendance on Wednesday, December 3rd walked out of the training course in protest against the company's actions. These three returned on Thursday, December 4th and were told that they too had resigned their employment.

10. Fourteen employees reported to work on Monday, December 1, 1980, completed the training and were assigned to their former work places. The remainder have not returned to work but the evidence establishes that they desire to do so. Although none of these employees gave a credible explanation for the failure to notify the company of their intended absence on Tuesday, December 2nd, a number of them gave credible explanations for not attending at work on that day. The company did not accept any of the explanations which were offered but maintained that the employees who failed to report for work on Tuesday, December 2nd, without notification to the company, had resigned their employment.

11. It has been the practice of the company to train its retail sales employees prior to assigning them responsibility for a work location. In most cases training has taken place on a individual in-store basis. The returning employees had received the benefit of this training when they entered the employment of Fotomat and many of them had considerable work experience with the company. However, Mrs. Hallett testified that because the strikers had not worked for over 14 months, and because the company had introduced a charge card system, a courier system and new merchandise during their absence, the company decided that refresher training was required. She testified further that it was not feasible to institute in-store training because of the numbers involved and because the striking employees would have been required to work alongside the strike replacements whom they were about to displace. An outline of the material covered in the training course was tendered in evidence. In fact, the training was carried on for five days.

12. Mrs. Hallett testified that in adopting the position which it did with respect to the employees who failed to appear on Tuesday, December 2nd and failed to notify the company the company was following its past practice. She testified that when a Fotomat employee fails to notify the company of her absence from work the company terminates. When asked if this practice was followed where the absence was for a single day, she replied "just failing to appear is not so crucial but when an employee doesn't notify and doesn't show up at our operation, it is closed. We have an obligation to the public and the store is closed until we can open it up." Mrs. Hallett was referring to the operation of the company's retail outlets. Mrs. Hallett testified that the company's practice in this regard had been a long-standing one. When she was shown a copy of an internal company policy guide which stated that any employee who is absent for three days or more will be deemed to have abandoned her employment, Mrs. Hallett acknowledged that there had been a change in policy but testified that she couldn't be exact as to when but that it had occurred some time ago. She admitted that the employees had never been notified of the change in company policy respecting deemed resignations. When asked to provide a business explanation for the company's reliance on its purported policy, Mrs. Hallett testified that the business reason was that they had resigned. She gave no other explanation. The company submitted 21 Employee Status Change forms showing resignation for failure to give notice of absence in support of Mrs. Hallett's evidence that the company acted in a manner consistent with its past practice. However only four of these show the company as having processed the deemed resignation within a single day of the absence. The remainder show the company as having processed the resignation after the passage of a longer period of time, in many cases up to one month.

13. The respondent takes the position that it complied fully with the Board's order of October 24th when it accepted into employment the strikers who had made application to return to work. The respondent argues that it was reasonable for the company to retrain persons who had not worked for some 14 months and asks the Board to find on the basis of the training outline submitted in evidence that the decision to undertake a 4-day training programme was a reasonable one. The respondent maintains that the Board's order of October 24, 1980 is ambiguous and that the company's understanding that it was required to provide work for the returning strikers by December 1, 1980 does not evidence anti-union intent. The respondent asks the Board to find that the notice period provided by the company and the decision to retrain were free of anti-union motive. The respondent asks the Board to pay special attention to the fact that the employees walked out of the December 1st meeting on their own initiative and to conclude that the company had every intention of returning them to employment. It is the respondent's position that the employee's did in fact resign their employment and that the company, in applying its absence without notice policy, did not exhibit an anti-union motive.

14. The complainant argues that the respondent purposely created the situation which resulted in the walkout by the returning employees and then sought to take advantage of it for anti-union reasons. The complainant cites the short notice period and the duration and site of the training programme in support of its contention. The complainant maintains that at best the returning employees may have needed a one-day refresher which could have been given in-store. The union asks the Board to consider the effect of the company's action, the history of its relations with the union and the absence of a satisfactory business explanation and to conclude that the company dealt with the returning employees as it did for anti-union reasons.

15. In reply the respondent reminds the Board that the union did not advise it of the

names of the returning employees until November 26th and in view of the ambiguity of the Board's October 24th order, asks the Board not to impute an anti-union motive from the duration of the notice period. The respondent maintains that because the employees walked out on their own there can be no question of anti-union motive on the part of the company. The respondent points to the employee's refusal to sign time cards, the decision to leave the December 1st meeting and the failure to return on December 2nd as satisfying both the subjective and objective conditions precedent to a resignation. It is the respondent's position that it is under no obligation to reinstate employees who have resigned their employment and its decision not to reinstate cannot be found to have been motivated by anti-union considerations.

16. The provisions of section 79(4a) of the Act apply in this case. Section 79(4a) provides:

"On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization."

The section requires the respondent to establish on the balance of probabilities that its treatment of the striking employees was free of anti-union animus.

17. The Board must assess the conduct of the respondent company vis-a-vis the employees who returned to work pursuant to the Board's order of October 24, 1980. The Board must decide if, as is alleged by the complainant, the company acted to create a situation designed to provoke a response from the returning employees which would allow it to deny them employment. Even if the company did not act to precipitate such a response from the returning employees the Board must also assess the legitimacy of the company's blanket refusal to allow those who absented themselves from the training course to return to employment. Clearly, if such a refusal was motivated by anti-union considerations it would be in violation of the Act.

18. Given the union's delay in advising the company of the names of the returning employees and the rationale advanced by the company in support of its training format, we are not satisfied that the company deliberately created a situation designed to provoke a response which would allow it to discontinue the employment of the returning strikers. Indeed, given the union's previous successes before the Board, the company could logically have assumed that any such scheme would be met by a complaint filed under the Act and not by a resort to self-help. This is not to say, however, that the employees who returned to work on December 1st did not perceive themselves to be the subject of company mistreatment. We are satisfied that they did.

19. The company's response to the walkout is a different matter. Emotions ran high during the strike and continued to run high as the strikers returned to work. It was for this reason that Mrs. Hallett was apprehensive about what to expect when she faced the returning employees. The short notice period caused an inconvenience to many of the returning

employees and was viewed by them as an attempt by the company to mistreat them. The announcement of a 4-day training course in Toronto was viewed in the same light. The returning strikers, who had maintained their status as Fotomat employees through a 14-month strike, considered themselves to be victims of company mistreatment and responded in protest. Their response was an emotional and ill-advised attempt to alter the conditions upon which they were being returned to work. It was not an action taken with a view to severing the employment relationship. We accept the evidence of the returning employees, as consistent with all the surrounding circumstances, that there was no intention of resigning employment.

20. Did the company believe that those who had returned following a 14-month strike had resigned their employment by virtue of their actions on December 1, 1980? Even if we assume that the company held this view initially, the attempted return to work on Wednesday, December 3rd should have given the company serious cause to reconsider. Instead, the company remained adamant that the employees had resigned en masse and turned a deaf ear to the explanations which were advanced.

21. The company maintains that it treated these employees in accord with a long-standing policy. In fact the last written instructions issued by the company allow for up to three days' absence before a resignation is deemed to have occurred. The evidence adduced with respect to the actual practice does not establish that the company responds to single day absences without notice in as inflexible manner as it did in this case. Regardless, the rationale advanced in support of a firm and inflexible approach does not apply in this case. The policy flows from the nature of the company's retail business. The company operates numerous retail outlets which are staffed by a single person. If the person assigned to an outlet is unable to attend at work and fails to notify the company the outlet remains closed. In order to impress upon its retail employees the importance of prior notice, the company has developed a strict policy in response to absences without leave. However, the employees in question were not working in retail outlets at the time but were assigned to a group training programme. The rationale for the policy does not apply. Notwithstanding this fact, the company applied it in a blanket manner and could give no other business explanation for refusing to permit the grievors to return to work.

22. When reference is had to the absence of a credible business justification for its response, to the history of relations between the respondent company and the complainant trade union, to the timing of the blanket application of the policy referred to above and to its effect, we are compelled to conclude that the company acted for anti-union reasons. This Board has found that the respondent company breached its duty to bargain in good faith and made every reasonable effort to conclude a collective agreement on two occasions. In its February 18, 1981 decision, the Board held that the bargaining conduct of the respondent was designed to undermine the very basis for collective bargaining and found violations of section 58 and 61 of the Act as well as section 14. The bargaining conduct which gave rise to these findings occurred on December 3, 1980, the same day that the employer relied on the policy referred to above to refuse to allow any of the employees who had been absent without notice on Tuesday, December 2nd to return to work. The effect of the company's refusal was to strip all but one of the bargaining units outside Metropolitan Toronto of union members who had supported the strike for its duration. The company must be presumed to contemplate the consequences of its actions and in the absence of a credible business explanation, an adverse inference can be drawn. In this case, the company failed to provide a credible business explanation for its actions.

23. Having regard to all of the circumstances we can come to no other conclusion but that the respondent was motivated by anti-union considerations when it persisted in characterizing the employees' actions of December 1, 1980 as a mass resignation and refused to allow any of the employees who were absent without notice on Tuesday, December 2nd to continue their employment with the company. We hereby find that the respondent violated sections 56, 58 and 61 of *The Labour Relations Act*.

24. Turning to the issue of remedy. In our view there are basically three groups of employees who must be dealt with in shaping a fair and effective remedy. The first is the group of employees who were present at the training programme, absented themselves without leave and physically attempted to return but were refused by the company. These employees should be returned to work with full compensation from the date of their attempt to return to work. The second group of employees includes those who did not physically attempt to return but contacted the company and offered explanations for their absence. The company refused to entertain any of these explanations and its blanket approach in this regard was part of its unlawful conduct. While the company may not have accepted all of the explanations offered if it had been acting without an anti-union motive, we have no way of knowing for certain which explanations may have been accepted and which may not have been. In these circumstances, the benefit of any doubt must be resolved in favour of the employees who have been refused employment. The employees who fall within this second category must also be reinstated and the quantum of their compensation determined on a case-by-case basis. The third group of employees comprises those who did not attempt to return and did not contact the company but heard from others that the company was taking the position that they had abandoned their jobs. In our view, it is not unreasonable that an employee who was aware of the stance being taken by the company would not have wished to pursue the matter with the company. Indeed, the evidence establishes that a direct approach to the company would have proven futile. Accordingly, these employees must also be given the benefit of any doubt and reinstated. It is our view that compensation from the date as of which they were aware of the futility of approaching the company directly should be paid if they now return to work and thereby dispel any doubt that it was their firm intention to return to work.

25. Having regard to all of the foregoing, it is the order of this Board that:

- (1) The returning employees who absented themselves without notice on Tuesday December 2nd and attempted to return to work on Wednesday, December 3rd (including those who went to the company office) be reinstated forthwith to their former jobs and compensated for lost wages for the period Wednesday, December 3, 1980 to the date of their reinstatement.
- (2) The returning employees who absented themselves on Wednesday, December 2nd and attempted to return on Thursday, December 4th, be reinstated forthwith to their former jobs and compensated for lost wages for the period Thursday, December 4, 1980 to the date of their reinstatement.
- (3) The returning employees who absented themselves without notice on Tuesday, December 2nd, and contacted the company on Monday, December 8th, be reinstated forthwith to their former jobs and compensated for lost wages for the period December 8, 1980 to the date of their reinstatement.

- (4) Karen LeMoine and Diane Hersey, both of whom contacted the company on Wednesday December 3rd and provided credible explanations for their absence the previous day be reinstated forthwith to their former jobs and compensated for lost wages from December 3, 1980 to the date of their reinstatement.
- (5) Sheila Fountain who had her first child on November 5, 1980 and contacted the company on December 8, 1980 be reinstated forthwith to her former job and compensated for lost wages from the date she would have been physically able to work to the date of her reinstatement.
- (6) Irene McKinstry who attended on December 1st but left early due to the beginning of her husband's shift and babysitting problems but did not contact the company following December 1, 1980 be reinstated forthwith to her former job.
- (7) Chris Clement who worked as a weekend driver for the company and did not attend on Monday, December 1, 1980 because of full-time employment elsewhere but advised the company of this fact, be reinstated forthwith to her former job and compensated for lost wages from the weekend of Saturday December 6th to the date of her reinstatement.
- (8) Linda Luinstra who did not attend the training session because of the hospitalization of her child in Barrie but reported for work on December 8, 1980 be reinstated forthwith into her former job and compensated for lost wages from Monday, December 8, 1980 to the date of her reinstatement.
- (9) Mike Wilks, a part-time employee who is a full-time grade 13 student who walked out on December 1st and did not return to the training session because he could not afford time away from his studies during the day and advised the company of this fact, be reinstated forthwith to his former job and compensated for his lost wages from Monday, December 8, 1980 to the date of his reinstatement.
- (10) Pam Perry, Barbara Van Sickler and Rose Chiu who did not attempt to return following December 1, 1980 but heard from others of the position taken by the company be reinstated forthwith into their former jobs and, if they return to active employment with the company, that they be compensated for lost wages as if they had worked from December 8, 1980.

26. In addition, the respondent is directed to post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative, in conspicuous places at its places of business where bargaining unit employees are employed and to keep those notices posted for 60 consecutive days. Reasonable steps shall be taken by the respondent to

ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to all such premises shall be given by the respondent to two representatives of the complainant to satisfy itself that this posting requirement has been and is being complied with.

27. The respondent is further directed, at its own expense, to mail a copy of the attached notice marked "Appendix" after being signed by the respondent's representative, to the residence of each employee in the said bargaining units forthwith.

28. The Board will remain seized of this matter in the event of any difficulty with the implementation of its remedial order.

1593-80-R Teamsters Local Union. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Frito-Lay Canada Ltd.**, Respondent, v. Group of Employees, Interveners.

Certification – Petition – Petitioners revoking names from petition and confirming union membership – Whether counter-petition voluntary – Board discussing standards of voluntariness applied to petitions and counter-petitions

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. Armstrong and J. A. Ronson.

APPEARANCES: *L. Gottheil, D. Parfitt and R. Brazeau for the applicant; J. B. Noonan, J. R. Wright and Wm. McPhee for the respondent; J. Sotos for the interveners.*

DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER B. ARMSTRONG; May 8, 1981

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board finds, pursuant to section 6(1) of the Act, that all route salesmen employed by the respondent working in Mississauga, Ontario, save and except district sales manager, persons above the rank of district sales manager, warehousemen, office staff, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. In support of this application for certification, the trade union filed documentary

evidence of membership on behalf of approximately seventy-seven per cent of the employees in the bargaining unit found by the Board to be appropriate. This documentary evidence took the form of membership cards which included a combination application for membership, and an attached receipt. These cards are signed by the employees, and the receipts are countersigned and indicate that a payment of one dollar had been made to the union. The documentary evidence is supported by a properly completed Form 8 statutory declaration attesting to the regularity and sufficiency of the membership evidence. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner it was solicited. The form and contents of the evidence are satisfactory and it was properly filed within the time limits prescribed pursuant to section 92(2)(j) of the Act. The union membership evidence, standing by itself, demonstrates that the union has a level of “membership support” well in excess of that required for certification without recourse to a representative vote.

5. There was also filed with the Board a statement of desire or “petition” signed by thirteen employees indicating that they wished to oppose the certification of the applicant. This petition included the names of six individuals who had previously signed membership cards and paid one dollar in respect of membership fee; and were, therefore, “members” of the union within the meaning of section 1(1)(j) of the Act. These “members” had had purported change of heart and now allegedly no longer wished to support the applicant’s certification. It was apparent, that if all of the union’s members who signed the petition had had a *voluntary* change of heart, and now no longer wished to support the union’s certification, the Board would, in accordance with its usual practice, exercise its discretion to order a representation vote to resolve the issue. This is the course of action urged by both the respondent and interveners.

6. Following the signing of the petition, however, all six of the union members whose signatures appear on it, signed a further document indicating their desire to delete their names from the petition and reaffirming their support for the union. This “revocation document” also takes “petition form” and has five signatures on one side, under the following heading:

“I/We the undersigned did sign a petition against the formation of a union at Frito-Lay Can. Ltd/ Mississauga Plant due to pressure. I/ We do hereby renounce such signature/signatures and the intent therein contained and do hereby state that I/ We wish my/our name/names deleted from the said petition and do so desire to have Teamsters Local 647 to be my/our bargaining agent.”

A sixth signature appears on the back of the document under a somewhat different handwritten heading:

“I the undersigned wish to strike my name from the petition against the union, to avoid detection in this manner.”

In the case of five of the six signatures, the signature of a witness appears adjacent to that of the subject employee.

7. Statements of desire, or “petitions” are not regulated by the Act as directly, or precisely, as union membership evidence. There is no statutory definition equivalent to section

1(1)(j), nor is there any requirement for a monetary payment (in the nature of consideration confirming the act of signing), on a statutory declaration of regularity similar to Form 8. Nevertheless, the existence of statements of desire appears to be contemplated by section 92(2)(j) of the Act and Rule 48 of the Rules of Practice; and in any event, the Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary, there is evidence given in accordance with Rule 48, and the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt that the union's members continue to support its certification. The Board must be satisfied however, that when these members signed the petition evidencing an apparent change of heart, they were doing so voluntarily and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer or could result in reprisals.

8. It must be clear that the circulation of the petition is free from the actual, or perceived, influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before; and while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. Frequently, such petitions are openly circulated on or near the employer's premises during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with the employer and may be so preceived. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly an employee may be motivated to sign a petition because of employer conduct subsequent to his joining the union which suggests that continued support for the union will result in the loss of his job, or other adverse employment consequences. In neither case, can one regard his signing the petition as truly voluntary because in both cases, it results from a perceived threat to his job security. It is for this reason that the Board undertakes the inquiry contemplated by Rule 48(5) in order to satisfy itself from the circumstances of the originaiton, preparation and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. In *Radio Shack* [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

"The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union, represents a voluntary change of heart. The Board recognizes that the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶16, 264 in the following terms:

'In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights

under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.’

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)”

9. “Revocations” or statements reaffirming membership in or support for a union are not specifically regulated by the Act either; but, as in the case of petitions, the Board has a well established practice of recognizing such documents-provided that they are filed in a timely fashion, and there is sufficient evidence of the circumstances of their circulation that the Board can be satisfied that they too represent a voluntary statement of employee wishes. In this respect, both “petitions” and “revocations” have equal status. If a person who has signed both a membership card and a statement opposing the union, *subsequently voluntarily* reaffirms his membership in, and/or continued support for, the union, the Board will generally disregard the effect which the appearance of his signature on a statement opposing the union might otherwise have had, and will treat his most recent statement as the best evidence before the Board as of the terminal date (i.e. the time prescribed pursuant to section 92(2)(j) of the Act for ascertaining membership under section 7(1) of the Act). In other words, where there is a properly signed and countersigned membership document which is supported by consideration and a properly completed statutory declaration, as well as a voluntary revocation of any intervening statement in opposition to the union’s certification, the Board will usually disregard the latter, and treat the membership document and the revocation as both sufficient evidence of membership within the meaning of section 1(1)(j) and sufficient reason why the Board should not exercise its discretion to order a representation vote.

10. While petitioners and revocations have equal status in the sense set out above, the Board recognizes that in assessing the weight to be given to a revocation or “counterpetition” there are different considerations than in the case of a petition opposing the union. In the case of a petition, employee signatories are more likely to be sensitive to the perception of management involvement, or the fear that, a failure to sign may be communicated to their employer and could result in reprisals. In the case of membership evidence or revocations,

however, support will seldom be solicited by individuals who can affect an employee's economic destiny, nor will there usually be any fear that a failure to sign a membership card or revocation will be communicated to the employer and could result in adverse employment consequences. (However, see *Veres Wire* [1976] OLRB Rep. July 337 where the Board rejected certain union membership evidence because of the involvement of a foreman in the union's organizing campaign). Accordingly, the purpose of the inquiry into the origination of a revocation statement is to determine whether there is any evidence of threats, intimidation, undue influence, misrepresentation, or other conduct which might impair the ability of an employee to voluntarily express his wishes. The concerns expressed in *Radio Shack* and *Pigott Motors* have no strict application to revocations or union membership evidence.

11. The Form 5 notice to employees was posted on the respondent's premises on Friday, October 31, 1980. The terminal date (i.e. the date by which membership documents or statements opposing the union must be filed with the Board) was fixed at November 6, 1980. The activity giving rise to the petition and revocation documents took place between November 4th and November 6th. In both cases, this activity was somewhat rushed, as the opponent and principal supporters of the trade union both sought to persuade their fellow employees to take a position or change their minds prior to the November 6th deadline.

12. Charles Craig was the author and sponsor of the petition. Dan Parfitt and Rick Brazeau were the proponents of the "counterpetition" or revocation document. The Board heard evidence from all three employees concerning the origination and circulation of their respective documents. As might be expected when employees are asked to recall events which have occurred some time before, the evidence of each witness contained certain inconsistencies or was varied as cross-examination sharpened their recollection. Some of these inconsistencies are noted hereunder but, in the result, we do not think that they effect the ultimate outcome of the case.

13. The activities surrounding both documents reached a peak on November 6th, and to some extent, the campaigns were carried on concurrently. It will be convenient to deal first with the petition, then turn to the revocations. In order to preserve the confidentiality of the names on the petition and revocation documents, (see section 100 of the Act) where it is necessary to do so, the Board will refer to the petitioners as P-1, P-2, P-3, etc. and to the persons who subsequently revoked their names from the petition as R-1, R-2, R-3, etc. R-6, for example, with the sixth signatory of the revocation document and it was he who signed under the separate heading mentioned in paragraph 6 above.

14. As we have already mentioned, the moving force behind the petition was Charles Craig. Craig had not been approached to join the union. The union supporters knew that he socialized with managerial personnel and concluded (correctly as it turned out) that he would not be receptive. Craig learned of the certification application on October 31, 1980, when the Form 5 notice was posted, and told the Board that he typed the petition at home and began to circulate it on Tuesday, November 4th, (the petition is dated "this fifth day of November"). He also testified that he was scheduled to be on holidays during the week of November 3rd, and that, consequently, he was free to pursue this activity both on and off company premises during the regular working day. Craig maintained that there was no management involvement with the document, although he acknowledged that the respondent must have known about his activities.

15. The respondent has collective bargaining relationships with the applicant in other parts of its operation, and appears to have taken a “hands off” attitude with respect to all employee activity in favour of, or opposed to the trade union. When the Form 5 notice to employees was posted, the management of the respondent advised its employees that the notice spoke for itself and that they (management) were unable to make any comments as to the response which employees should make. Indeed, when Craig and Brazeau approached management for the home phone numbers of the employees in the bargaining unit, they were given these numbers without comment and without any questions being asked. When Craig told a member of management that he (Craig) intended to hold two meetings in the salesmen’s room and that there should be no managerial persons present or in the vicinity, no effort was made to promote or interfere with those meetings, and managerial personnel were neither present nor did they interrupt the discussion.

16. The first meeting was held at the end of the business day of Wednesday, November 5th, in the salesmen’s room adjacent to the management offices. The Wednesday evening meeting lasted about 45 minutes and the employees present debated the “pros and cons” of the union. Subsequently, some of them signed the petition and some went home.

17. A second meeting was held in the same place on the following morning. This meeting began about 8:00 A.M. and lasted till about 9:30 - that is during a period when the employees would ordinarily be on their routes. Again, there was no managerial personnel present, and the debate about the relative merits of union representation continued. In addition to calling these meetings, Craig also approached individual employees at various points along their delivery routes in an effort to persuade them to sign the petition. Craig was persistent, and in at least one case, approached an individual on three separate occasions. However, there is no evidence of any improper conduct, intimidation, or threat to employee job security.

18. Parfitt and Brazeau were aware of Craig’s activities, and the fact that some of the union’s supporters had signed his petition. On the evening of November 5th, Parfitt had a series of telephone conversations with Brazeau, Don Swait, (a union organizer,) and an employee who had signed the petition but wished to have his name removed. Parfitt discussed the possibilities of a counterpetition with Swait, and perhaps Brazeau, and as a result of those conversations prepared the revocation document in the form noted above. Parfitt and Brazeau then set about collecting the signatures of anyone whom they thought had signed the petition. The first such signature was the individual who the evening before had expressed reservations about signing the petition. That individual approached Craig on the morning of November 6th, requesting that his name be removed from the petition. Craig refused, and the employee (R-1) became the first individual to sign the revocation document.

19. Although there may have been some discussion among the employees after the meeting earlier that morning, no one except R-1 signed the counterpetition at that time. The rest of the signatures were solicited on the afternoon of November 6th. It seems clear, however, that the employees would probably have been aware of the activities of the supporters and opponent of the union.

20. Brazeau and Parfitt planned to make a final effort to solicit support for the union late in the afternoon of November 6th, and planned to meet the employees at a bank, a couple of blocks from the plant. It was the employees’ practice to visit the bank on Thursday

afternoons to collect their deposit receipts, so there was a reasonable prospect of contacting a large number of them. Brazeau explained that they considered the bank "neutral ground" and felt that the employees would be less inhibited if they were approached there. Parfitt and Brazeau realized that they would have to work quickly in order to solicit the necessary signatures within the time limit prescribed by the terminal date. To make this deadline, the revocation document would have to be mailed by registered mail no later than November 6th. Craig however, had precisely the same idea, and faced the same deadline. He too appeared at the bank late that afternoon.

21. Parfitt and Brazeau became concerned about the presence of the principal union opponent (who, as we have already mentioned, was perceived by Parfitt and Brazeau at least, as having a special relationship with management) so they decided that Parfitt would return to the plant to solicit signatures there, and return as soon as he could. Meanwhile, Brazeau hoped to engage Craig in conversation and perhaps delay his return to the plant. It was at the plant that R-2, R-3, and R-4 signed the revocation document. Parfitt, who witnessed their signatures, testified that the employees seemed to be aware of the counterpetition and that no persuasion or argument was required to induce them to sign it. Parfitt then returned to the bank. It was shortly after 4:00 P.M. by this time, and he was anxious to get as many signatures as possible and get the counterpetition in the mail. Upon his return to the bank, he gave the petition to Brazeau and, returned to his own truck which was parked nearby. R-5 and R-6 signed in Brazeau's truck.

22. It is in respect of the circumstances surrounding the signing of R-6 that the evidence is somewhat unclear and inconsistent. Parfitt testified that he was walking back and forth between his truck and Brazeau's and that he saw both R-5 and R-6 signing the document - although he was not present at Brazeau's truck during the intervening period, or even during the entire conversation. However, he also indicated in his evidence that by the time he got back to the bank, he thought that Craig had left. This remark was not pursued in cross-examination and it is with respect to the whereabouts of Craig and Parfitt, at the time R-5 and R-6 signed, that there remains some confusion. Brazeau testified that following some discussion with R-6, Craig came over to the truck too, and intruded into the conversation. Brazeau then asked Craig to leave, (which he did) and R-6 was just signing the hand-written part of the document as Parfitt approached. Brazeau told the Board that although Craig was not present when R-6 signed, he believed him to be in the vicinity. Craig recalls approaching Brazeau's truck and seeing R-6 in it. He also recalls Brazeau asking him to leave the truck so that R-6 could sign; but Craig testified that Parfitt did not arrive until just after R-6 had left - at which point he got into the truck with Craig and Brazeau. Neither Brazeau nor Parfitt mentioned this final conversation with Craig, although neither of them were asked about it specifically. They both said that after R-6 signed, Brazeau took the document to a post office because they were anxious to get it in the mail before the deadline.

23. It is difficult to reconcile the evidence of the three witnesses concerning the circumstances surrounding the signing of R-6, but we do not think we would be justified on the basis of this inconsistency in rejecting the totality of the evidence of any of them. Some degree of inconsistency is to be expected in every case, and results solely from the witnesses' imperfect recollection of events. All of the witnesses in this matter were straining to recall specific conversations and contacts in a situation in which all of them were rushed; and we do not think we should lightly infer a deliberate scheme to mislead the Board. Even if, Craig's recollection of events is preferred, his version does not reflect adversely on the voluntariness of

the signature of R-6 and there is no evidence of any threats, undue influence or impropriety with respect to the solicitation of any of the other signatures. Indeed, Brazeau testified that the wording of R-6's revocation statement was changed so that it would be clear that he had not been unduly influenced when signing the petition, and the evidence respecting the wishes of R-1 (while necessarily hearsay) was entirely consistent and confirmed by both Craig and the supporters of the union. Moreover, it must be remembered that if any two of the six signatures on the revocation document are accepted as voluntary, the union would retain the support of more than fifty-five per cent of the respondent's employees. Despite the evidentiary problems concerning the circumstances in which R-6 signed, we do not think the revocations statement should be disregarded.

24. Having regard to the totality of the evidence, the Board is satisfied that it should accept the revocation document as a bona fide statement by its signatories repudiating their support for the petition and reaffirming their support for the trade union.

25. Having regard to the totality of the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent were members of the union on November 6, 1980, the terminal date fixed for this application and the date which the Board determines, pursuant to section 92(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

26. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. The evidence in this matter causes me to believe that the Board, in its discretion, should order a vote to determine the true wishes of the employees.

2. The employer adopted a strict "hands-off" approach to the certification application. There is no evidence that it attempted to interfere in any way with these proceedings. Management personnel refused to discuss the union with employees, provided information about employees to the union organizers and the petitioners, and allowed employees to hold private meetings on the premises, at which the pros and cons of union representation were discussed. The employees involved are driver-salesmen and, if the three who testified before the Board are any indication, they comprise a sophisticated and very and very articulate work-force.

3. When the union organizers Parfitt and Brazeau became aware of Craig's petition on 5 November, 1981, they telephoned Don Swait, the business agent for the union. It was Swait who suggested that the revocation contain the statement that the employee had signed the "Craig petition" due to "pressure". The sixth person (R6) who signed a revocation refused to agree to this wording. The evidence of Brazeau was to the effect that R6 stated that he had not been pressured by Craig into signing the petition, but really wanted to stay in the good graces of both sides. That is the reason for the different wording of R6's revocation. Indeed there is no evidence whatsoever of improper conduct by Craig; to the contrary Craig had at least two cogent reasons to use in persuading employees that they did not need a union.

4. I am also concerned with the admission by Parfitt that he and Brazeau induced the six employees to sign the revocations by telling them that if "(the application) doesn't go

through and they find out who we are, we will be gone." Parfitt explained that the statement meant that the employer would fire those who had signed union cards if the union wasn't certified. We heard no evidence from which it could be suspected that this statement might be true or even founded on fact.

5. Lastly, there is no doubt in my mind that Parfitt and Brazeau attempted to mislead the Board with respect to the circumstances in which R6 signed his revocation. Both men testified that they did not pressure R6 into signing nor did a shouting match occur between them and Craig in the presence of R6. Under cross-examination by counsel for the employer, Brazeau blurted out that there was in fact a loud discussion between him and Craig in the presence of R6 and that he demanded that Craig leave him alone with R6. When Craig left, Brazeau then asked R6 if he would sign a revocation with a different wording and R6 agreed. The Board heard this evidence eight days after the incident took place.

6. We were invited by union counsel to "step into the shoes" of the employees in assessing the voluntariness of the membership cards, petition and revocations. Having attempted to do so, I do not feel the evidence indicates one way or the other what the true wishes of these employees are. I would order a vote.

0186-79-R Christian Labour Association of Canada, Applicant, v. Master Insulation Company Limited, Respondent, v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95

Certification – Applicant deciding not to proceed with application as respondent no longer in business-Whether Board dismissing and imposing bar-Board reviewing principles relating to imposition of bar

BEFORE: R. A. Furness, Vice-Chairman, and Board Members O. Hodges and R. W. Redford.

DECISION OF THE BOARD; May 8, 1981

1. In a letter to the Board dated March 2, 1981, the applicant has advised the Board that in view of the fact that the respondent is no longer in business it has decided not to proceed with this application for certification. In response to this letter the intervener, in a letter to the Board dated March 6, 1981, has requested that the application for certification made by the applicant be dismissed and a time bar imposed in accordance with the provisions of section 92 of the Act.

2. In a letter to the Board dated March 11, 1981, the applicant stated:

Thank you for your letter of March 9, 1981. I would respectively suggest that this is not an appropriate case for an Order to be made under

Section 92 of *The Labour Relations Act*. The application for certification in this matter was filed on April 27, 1979. By Order of The Ontario Labour Relations Board dated February 1, 1980, a representation vote was ordered to be taken of all employees in the bargaining unit. Since that time two votes have been taken. The Intervener was successful in having the first vote set aside on the grounds that the Board was not satisfied that the employees who voted were members of the bargaining unit. A second vote was taken on June 25, 1980 and the Intervener has made an application to have that vote set aside as well. This application is still outstanding.

We have now been advised by the Respondent that Master Insulation Company Limited has wound-up its affairs and that it no longer has any employees. My clients have been litigating this matter for almost two years and have been put to a great deal of expense not only because of the time involved but because of the number of appearances we had to make before the Board. Under the circumstances, it is a matter of common sense that they should not wish to proceed.

If the Intervener is successful in their application to have the latest vote set aside, the Board generally orders that a new vote be taken. As there are no employees in the bargaining unit, a new vote obviously cannot be taken. If the Intervener is unsuccessful and the ballots are counted the Christian Labour Association of Canada will at best have bargain [sic] rights for a now defunct company. In any event, it would appear to be a useless exercise to continue with this application.

I would, therefore, respectfully suggest that under the circumstances this is not a proper case for the exercise of the Board's discretion under section 92 of *The Labour Relations Act*.

3. In a letter to the Board dated March 19, 1981, the intervener has stated:

1. Counsel for CLAC confirms that it is the intention of her client not to continue with the Application for Certification. In these circumstances, and in view of the stage of the proceedings have reached, the Board has no choice but to dismiss the Application for Certification and Local 95 once again requests that the Application be dismissed.

2. As counsel has pointed out, and the Board is well aware, a representation vote has been directed and held in which the ballots remain uncouned. Where the Applicant Union no longer wishes to proceed with its certification after the Board has directed a representation vote, it is the customary practice of the Board since the *Mathias Ouellette Case*, 56 C.L.L.C., para. 1555, to impose a time bar pursuant to Section 92 of the Act, notwithstanding that the ballots may not have yet been counted. See also *The Bristol Place Hotel* [1979] O.L.R.B. Rep. 486 (June); *Devon Dairy Limited* [1961] O.L.R.B. Rep.

313 (December). Accordingly, Local 95 reiterates its request that the Board impose a time bar pursuant to Section 92 of the Act herein.

4. The respondent has not made any representations with respect to the positions adopted by the applicant and the intervener concerning the disposition of this application. The Board notes that none of the parties dispute the proposition that the respondent is no longer in business.

5. It is the practice of the Board to impose a bar pursuant to section 92(2)(i) where a representation vote has been conducted in a certification application and a trade union has failed to obtain the necessary support. As the Board pointed out in *Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441, one of the reasons for imposing a bar is to provide a cooling off period during which the employees may assess their position with respect to their desire to be represented by a particular trade union. Another reason, as set forth in *Campbell Soup Company Ltd.*, [1968] OLRB Rep. Feb. 1091, is because repetitious applications, where the evidence of membership has been fully tested by a representation vote, are not in the interest of sound labour relations.

6. Where a representation vote has been directed and a trade union seeks leave to withdraw its application, the Board will dismiss the application without imposing a bar. In such circumstances, the Board will draw to the attention of the parties the decision in *Mathias-Ouelette*, 56 CLLC ¶18, 026. The effect of this decision is to put the trade union on notice that a future application made within six months might be barred if the trade union had sought the withdrawal because it feared defeat in the representation vote.

7. The facts in the instant application are not similar to the facts which were present in the *Mathias-Ouelette* case, *supra*. In addition, the facts in the instant application are not similar to the facts in *The Bristol Place Hotel*, [1979] OLRB Rep. June 486, and in *Devon Dairy Limited*, [1961] OLRB Rep. Dec. 313. In those two cases the Board dismissed applications for certification and imposed a bar of six months where pre-hearing representation votes had been directed, conducted and the ballot box sealed when the trade union in each case made the request to withdraw its application for certification.

8. In the instant application the Board directed the taking of a representation vote on February 1, 1980, based upon the evidence of membership of the respondent's two employees who were at work on April 27, 1979. A representation vote was conducted by the Board on March 21, 1980, and the ballot box was sealed pending a further direction by the Board. The intervener raised an issue as to whether the two persons who cast ballots were employees within the bargaining unit. The Board, in a decision dated May 21, 1980, determined that neither of the two persons who cast ballots in the representation vote were entitled to cast ballots. The ballots cast in the representation vote were not conducted and a new representation vote was ordered to be conducted at an unspecified future date.

9. In a decision dated June 17, 1980, the Board directed the taking of a new representation vote. This new representation vote was conducted on June 25, 1980, and the ballot box was sealed pending a further direction by the Board. The intervener again raised issues with respect to the new representation vote and the Board listed this application for continuation of hearing in order to consider these issues. This continuation of hearing was adjourned on more than one occasion at the request of the parties. Before the intervener's issues with respect to the new representation vote were heard by the Board, the applicant

informed the Board in its letter dated March 2, 1981, of its decision not to proceed with this application for certification.

10. There is no doubt that it has been the Board's practice to dismiss an application for certification where an applicant informs the Board that it does not wish to proceed with the application where the Board has already entertained the application and has conducted hearings with respect to the application. The Board finds no reason to treat this application in any other way. There remains the question as to whether the Board should impose a bar. Section 92(2)(i) provides:

Without limiting the generality of subsection 1, the Board has power,

...

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

11. The wishes of the employees of the respondent in the bargaining unit have not been ascertained by the Board and the applicant does not wish to proceed with this application in circumstances where the respondent is no longer in business. This is an application under the construction industry provisions of the Act and the concerns expressed in *Watson Manufacturing Company of Paris Limited, supra*, are not usually applicable to applications for certification under the construction industry provisions of the Act. In non-construction industry applications the work force is usually a settled group of employees who are employed on a regular and ongoing basis. In the construction industry, employment relationships are typically of a short term nature with fluctuations in the number of employees who are at work on any given day. While the Board expresses no opinion as to the causes in the instant application, it is noted that on the date of the making of this application there were two employees at work, at the time of the holding of the first representation vote two different employees were at work and at the time of the holding of the second representation vote two entirely new employees were at work. In addition, it cannot be said that the applicant's evidence of membership has been fully tested as contemplated in *Campbell Soup Company Ltd., supra*, because the Board has not had an opportunity to make a determination on the issues raised by the intervener.

12. While it would be possible to make a determination on the issues raised by the intervener in the absence of the respondent, such a determination would not necessarily finally dispose of this application. It might well be that a third representation vote would be ordered by the Board. In all the circumstances, while this application is dismissed, the Board, in the exercise of its discretion, is not prepared to impose a bar on future applications for certification by the applicant.

2195-80-R; 2343-80-R Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Applicant, v. 449637 Ontario Inc., carrying on business under the name and style of **Rivard Mechanical**, Michel Rivard Plumbing Limited, carrying on business under the name and style of Rivard Plumbing, J. G. Rivard Limited, J. G. Rivard (Quebec) Limited, Respondents.

Construction Industry – Related Employer – Sale of Business – Employer employing brother – Brother commencing his own similar business – Whether two businesses related – Employer going out of business – Assets purchased by brother’s business – Whether sale of business – Special considerations in construction industry discussed

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

APPEARANCES: *David Jewitt and Leo Martel for the applicant; G. A. Howard for 449637 Ontario Inc. and N. S. Slover for respondents Michel Rivard Plumbing Limited and J. G. Rivard Limited.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON; May 11, 1981

1. This matter involves consolidated applications under sections 1(4) (“related employer”) and 55 (“sale of a business”) of *The Labour Relations Act*, seeking a declaration that a new numbered company, 449637 Ontario Inc., carrying on business as Rivard Mechanical, is bound by the provincial agreement of the applicant. File No. 2194-80-M, a referral of a grievance to the Board pursuant to the provisions of section 112a of the Act, has been held in abeyance pending the outcome of the present proceedings.

2. J. G. Rivard Limited has carried on business as a plumbing contractor in the Ottawa area since 1966, doing mainly residential work. The company has at all times been under the active direction and control of Jean-Guy Rivard, who, in addition, at all times held at least 998 of its 1,000 outstanding shares. J. G. Rivard Limited is a “union” company, having a history of collective agreements with the applicant Local Union 71. Since the beginning, Michel Rivard worked for his brother, Jean-Guy, first as a plumber in the field and then, as manpower permitted, as a field supervisor. On the evidence, there is no doubt whatever that J. G. Rivard Limited was, for both internal and external purposes, “Jean-Guy’s company”. Jean-Guy himself managed the company, and handled all of the estimating, bidding and customer relations, except in limited circumstances where he would be absent on vacation. If Michel Rivard encountered some work through a personal contact, like any other employee of the company he passed it on to Jean-Guy. Michel was one of the founding directors of J. G. Rivard Limited, but resigned as director in 1969 when a second company, Michel Rivard Plumbing Limited, was incorporated for tax-planning purposes. Michel was made the owner and director of Michel Rivard Plumbing Limited, as was paid his salary by J. G. Rivard Limited through the second company. Michel Rivard Plumbing Limited at no time carried on a plumbing business on its own behalf, and until 1979 had no one but Michel on its payroll. In 1979 the second company was used as a device to carry out some of the work of J. G. Rivard Limited with two individuals who either could not or would not become members of Local 71.

Local 71 discovered this and launched Board proceedings to recover damages as well as to bind Michel Rivard Plumbing Limited (and a third company) to its collective agreement. A settlement was negotiated and signed by the solicitors for J. G. Rivard Limited in mid-November. The settlement specifically provided that the collective agreement would become binding on Michel Rivard Plumbing Limited “on the basis that as at the date hereof John G. Rivard is the owner of a controlling interest of the voting shares of each company”. A few days prior to this, Jean-Guy had in fact “bought out” his brother from Michel Rivard Plumbing Limited (there were no assets), and Michel Rivard ceased to have any association with Michel Rivard Plumbing Limited.

3. The real events giving rise to these proceedings occurred the following summer. J. G. Rivard Limited had, over the previous 3 years, faced a steady diminution in work as a result of a fallen market and competition from non-union contractors in the residential field. By the end of 1979, a number of the union contractors in the residential plumbing field had gone out of business, including one which, at its peak, had employed some 150-200 plumbers year-round. Jean-Guy Rivard from time to time discussed the seriousness of the situation with Mr. Martel, Business Manager of Local 71, and urged Mr. Martel to take more action to control his own members. Mr. Martel did not dispute that, with more and more of the work going to non-union companies, his union was having difficulty preventing its members from going to work for those companies. He indicated that in the last renewal of the provincial collective agreement, in recognition of the problem, a lower rate was negotiated for residential than for commercial work.

4. This action by the union was not, however, enough to save J. G. Rivard Limited. By 1980 the company was down to some 6 to 8 men (from a peak of 60 in 1975), and essentially was staying in business through its work for one customer, a major home-builder by the name of Costain Ltd. J. G. Rivard Limited had for many years been primarily the successful bidder on the plumbing work for Costain, with a small amount of the work going to a second union contractor, B. R. Rousseau. Evidence was given before the Board by Mr. Ted Lusk, the individual responsible for awarding Costain's contracts. Mr. Lusk indicated that as of 1978, all of the bids for Costain's plumbing work came from union contractors. Subsequent to that, however, the impact of non-union contractors began to be felt, and Mr. Lusk on a number of occasions indicated to Jean-Guy Rivard that the price differential was becoming a factor. Mr. Lusk testified that Jean-Guy did his best to hold his prices, but it was gradually becoming impossible for him to compete. In the summer of 1980, Costain's next phase of homes were ready for bids, and Mr. Lusk let Jean-Guy Rivard know that the price Jean-Guy was looking at would not be competitive with the non-union contractor, B. & B. Plumbing. Jean-Guy decided there was no point in attempting to bid any longer, and passed his decision on to his brother Michel and the other employees, all of whom had been anticipating for some time that the end was near.

5. The evidence is that Michel and 4 of the other employees, including a foreman, of J. G. Rivard Limited had in the early part of 1980 discussed amongst themselves the possibility of going out on their own if the company could not continue in business, rather than going to work for someone else. A new company, the respondent 449637 Ontario Inc., was incorporated in June of 1980. Michel and the other employees have a loose profit-sharing arrangement with respect to the income of that company. When Jean-Guy notified Mr. Lusk that he felt he could no longer compete in business, he advised Mr. Lusk that some of his employees, including his brother, were going out on their own, and asked Mr. Lusk to give

them a chance. Mr. Lusk indicated that he would naturally consider them, but their price would have to be competitive. Michel Rivard was himself known to Mr. Lusk through his work in the field on Costain jobs. Michel did put in a bid on behalf of the new company, and, after some further negotiation with Costain, was accepted by them. Mr. Lusk testified that Michel's price was still a little higher than B. & B.'s, but that after talking to B. & B. and noting their aggressiveness, he had concerns that there might be a problem with their service.

6. In August of 1980, Michel and the other four employees took what tools they had acquired over the years and set up shop in Orleans, in the east end of the Ottawa Region, some 15 miles from the office and warehouse of J. G. Rivard Limited. All of the original tools kits and other equipment of their former employer remained at the premises of J. G. Rivard Limited. The new company adopted the trade name "Rivard Mechanical" and has its own telephone number and business listing. Its work has been primarily the new Costain project, but two of the five employees have been employed on a new, unrelated job which Michel obtained in Cumberland, and on repair work in the Orleans area. The new company has purchased equipment of its own as required for more diversified jobs, the bulk of it in November and December of 1980. J. G. Rivard Limited had owned 10 trucks at the time of its discontinuance, and the majority of them were sold for scrap. Four of the trucks were worth restoring, and were sold to a car dealership and leasing company of which Jean-Guy Rivard is a 50 per cent owner. Michel subsequently attended at the dealership premises with Jean-Guy's partner, who is the active partner in the vehicle companies, with a view to buying new trucks, and instead entered into lease agreements for the four old trucks. The trucks, which had J. G. Rivard Limited's lettering on them, were painted over one by one, in new colours, and when the work on them was completed, the leases were signed. For a couple of weeks prior to that Michel was permitted to use the trucks, before painting was complete; in that interim, white paint was applied by roller over the lettering, but it appears that the name "J. G. Rivard Limited" was discernible through the paint.

7. J. G. Rivard Limited continued to employ 2 plumbers until the end of 1980 to complete the 1979 contracts it had with Costain, and has performed a small quantity of service work as well. It presently employs a small office staff for the purpose of winding up the business. Jean-Guy testified that he has bid on a couple of commercial contracts since the summer of 1980, but has been unsuccessful. The overlap of work between J. G. Rivard Limited and Michel's company has meant that on occasion employees of both companies have been present on the same Costain job site. There has, however, been no interchange of employees whatever between the two companies, for the purpose of carrying out their respective contracts.

8. The first point to be commented on, on the above facts, is the extent of the emphasis placed on the respondents on the fact that what occurred here arose solely as a matter of economic survival. While the Board is not insensitive to such problems, it must be stated unequivocally that *The Labour Relations Act* nevertheless does not contemplate or permit the unilateral withdrawal by one party from its obligations under the Act, or the achievement of this end simply by choosing to carry on the same business in a different form. Indeed, the provisions of section 1(4) in particular were designed to eliminate such action. While the Board is given an important measure of discretion under section 1(4), to exercise that discretion on the basis that an employer party was unable to fulfill its legal obligations on a competitive basis would undermine the scheme of the Act, and the very provisions of section 1(4) itself. Counsel for Rivard Mechanical argues: "There is not intent to interfere with the

union but economic realities require that they must maintain a non-union operation". Clearly nothing is more fundamentally destructive of a union's rights and interests than operating non-union, and "economic realities" simply cannot be used to justify this. While it is obviously to no party's advantage for the employer to be forced out of business, that possibility is a problem which, under the Act, must be dealt with on a bilateral basis. The applicant trade union in this case, for example, has recognized the problem and taken certain steps to accommodate it. Whether these steps are adequate is a matter for the trade union itself to assess, and for time to ultimately judge.

9. There is, on the other hand, nothing in *The Labour Relations Act* to prevent an individual employer from deciding in these circumstances to no longer continue in business, and the protection afforded to a trade union and its members may well be limited when that occurs. That is, in fact, what has occurred in the present case. Jean-Guy Rivard clearly was the entrepreneurial force and directing mind behind J. G. Rivard Limited throughout its history, and a surviving complement composed of Michel Rivard and other former employees, absent Jean-Guy Rivard, can in no way be said to be a "related employer" for the purposes of *The Labour Relations Act*. Section 1(4) reads:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

It is clear that the effective control and direction over the operations of J. G. Rivard Limited was exercised by Jean-Guy Rivard, and Jean-Guy Rivard exercises no control or direction whatever over the new company. When Jean-Guy chose to drop out of the picture, "the essential unity and identity of an economic activity" necessary to a finding of "related employer" was gone. For reference in this regard, see *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, at paragraph 13. In that case an individual named Munro had carried on a steel-erecting business with two brothers as partners. Munro himself, however, was the driving force behind the business and after the partnership fell on hard times and split apart, Munro set up an identical business on his own under the name Provincial Steel. Mr. Munro ran the latter business out of the basement of his home, just as he had the former. The Board stated, at paragraph 5:

5. Bill Munro was the key figure in the enterprise supplying virtually all of the business expertise and entrepreneurial initiative. Munro had worked in the industry for many years and had useful contacts and a good business reputation. It was Munro who solicited business, did the estimating and bidding for jobs, prepared price and man-hour projections to establish the work force which would be required, did the take-offs from the drawings, kept the books, prepared the payroll, and did the invoicing and other documentation associated with the business.

It was Munro who signed the collective agreement on behalf of the partnership. The Squire brothers were "working foremen" who, together with the hired labour force, actually did the work on site.

and at paragraph 14:

...We are satisfied that Munro's pivotal role in running the affairs of Brant Erecting and Hoisting and Provincial Steel, satisfies the requirement under section 1(4) that two allegedly "related" employers must be "under common control or direction".

and at paragraph 16:

16. The present case provides a classic example of the kind of business situation to which section 1(4) was intended to apply: The business of Brant Erecting, which was largely controlled and directed by Bill Munro, ran into difficulties and came to a halt in April, 1979. Munro, who, we are satisfied was the principal entrepreneurial force behind the Brant Erecting business severed his connection with that firm and immediately established a virtually identical business under the name of Provincial Steel carried on through a company incorporated by his wife. The business ability, contacts, expertise, and goodwill vested in Bill Munro himself; and some of the assets formerly used by Brant Erecting, became the assets and advantages which were the key to Provincial Steel's business success. There has been no change in the character of the business nor in the employee skills required by it. Provincial Steel is run (as was Brant Erecting) from an office in the Munro's basement and serves essentially the same clientele as was served by Brant Erecting. There was no hiatus between the apparent demise of Brant Erecting and the launching of Provincial Steel as a going concern. This is not a case in which a "key man" leaves one employer to go to work for another, or establishes a new business of his own in competition with his former employer. Here, the incorporation of Beverley Munro Inc., was undertaken so that Bill Munro could carry on essentially the same business as before. In our view these transactions fall squarely within the mischief of which section 1(4) is directed, and we are satisfied on the evidence before us that Brant Erecting and Hoisting and Beverley Munro Inc. carrying on business as Provincial Steel, carry on associated or related businesses, (ableit not simultaneously) under common control or direction. Accordingly, the Board is satisfied that it should declare that these two business entities are and always have been "one employer" for the purposes of the *Labour Relations Act*, and that Beverley Munro Inc. is bound by and must recognize any collective agreements or bargaining rights held by the applicant in respect of Brant Erecting and Hoisting.

In this case, by contrast, it is the "key man" himself who has decided to drop out, causing subordinate members of his organization to venture out on their own. As no common control or direction can be said to exist between the two economic organizations, the trade union must look to section 55 of the Act for its protection, if any. It should be noted that the short-lived

employment of plumbers by Michel Rivard Plumbing Limited in 1979 does not affect the result in this case. It is clear that Michel Rivard Plumbing Limited at all times operated as no more than a payroll company for J. G. Rivard Limited, and had no presence of its own in the plumbing industry. In addition, this is not a case where it could be said that Jean-Guy and Michel Rivard exercised joint control over both companies. That kind of equality did not exist. If, as appears to be the case, effective control and direction over Michel Rivard Plumbing Limited was in the hands of Jean-Guy Rivard, that company and the new company (Rivard Mechanical) controlled by Michel Rivard would not be "related employers". Assuming, on the other hand, that *Michel* Rivard controlled Michel Rivard Plumbing Limited by virtue of his position as President (and owner), Michel Rivard was severed from all such connections with Michel Rivard Plumbing Limited a few days before the November 1979 memorandum was signed. This in itself raises a suspicion that the spin-off of Michel on his own in the brothers' contemplation as early as this November transaction. The applicant did, however, accept the settlement on the basis set out in the memorandum, which specified that it would operate "as at the date hereof", because of Jean-Guy's common ownership of the shares.

10. We turn therefore to a consideration of section 55 of the Act, which provides:

55.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

- (2) Where a employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

...

As can be seen, the term "sale" is defined very broadly, and the term "business" is not defined at all. As the Board stated in *Raymond Cote*, [1968] OLRB Rep. March 1211:

The meaning to be attached to the word "business" depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is "the totality of the undertaking". The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se*

but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business.

11. The list of possible factors is, needless to say, endless, but the applicant relies heavily on a passage from the *Culverhouse Foods* case, [1976] OLRB Rep. Nov. 691, at paragraph 16, where the Board commented:

In each case the decisive question is whether or not there is a continuation of the business . . . The most appropriate test to be applied in making this determination is whether the nature of the work performed subsequent to the transaction is the same as the nature of the work performed prior to the transaction.

This is only a starting point, however, as the remainder of the paragraph demonstrates. As the Board noted in *Metropolitan Parking*, [1979] OLRB Rep. Dec. 1193, at paragraph 32:

... Unless there is a continuation of the work and jobs, it would make little sense to preserve the collective agreement. Accordingly, the continuity of the work done is an important indicium of a transfer of a business.

And earlier, at paragraph 19:

In the absence of a successor rights provision any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business, its transfer to other individuals, or a change in a partnership, would all effect a change in "the employer" even where the plant, equipment, products and work force remain substantially the same. The employees might find themselves working at the same plant, at the same machine, under the same working conditions, with the same supervision, doing exactly the same job as before, but as a result of a transfer (of which they may not even be aware) their collective bargaining rights and their collective agreement would disappear.

This statement of course contemplates the situation, as in *Culverhouse*, where the successor actually inherits the physical premises of its predecessor. The identity of employees is never a determinant for the Board, and where common situs is not a factor, the nature of the work performed becomes less of a determinant as well. On both of these points regard may be had again to *Metropolitan Parking*, at paragraph 36:

"36. Despite the labour relations focus of the statute "the business" is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employee may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going

concern; but these cases are rare. For the most part, the continued employment of the predecessor's employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJYC Ltd. et al.*, (1978) 1 Can. LRBR 565:

"The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees of an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. *Bargaining rights do not attach to certain specific employees as individuals.* Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it . . .

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand.

[Emphasis added]"

12. This is the approach which the Board adopts in distinguishing the predecessor's business from a similar or parallel business. See, e.g., *Thunder Bay Ambulance Services*, [1978] OLRB Rep. May 467. In deciding whether there has in fact been a "sale of a business", the Board noted in *Metropolitan Parking, supra*, at paragraph 30:

The vital consideration for . . . the Board is whether the transferee has acquired from the transferor a functional economic vehicle.

Whether a sale of particular elements amounts to a "sale of a business" within the meaning of the Act depends on whether what was transferred, in all of the circumstances, possesses "that dynamic quality which distinguishes an idle collection of surplus assets from an active, severable and coherent part of a going concern" (*Metropolitan Parking*, at paragraph 33). Or, put more simply, "bargaining rights continue only when the employer transfers *his* business" (*Metropolitan Parking*, at paragraph 44). "Goodwill" is, of course, another way of describing the essential quality which distinguishes one business from another of like character. This was described in *Dufferin Steel*, [1976] OLRB Rep. March 81, paragraph 20, as being "the attractive force which brings in customers". The elements which make up this "attractive force" will of course vary from case to case, and industry to industry.

13. In the construction industry, much of the “goodwill” associated with a particular business is personal to the key man in the organization. As Mr. Lusk of Costain testified, any contract which his company lets is valid only so long as the original contractor continues to perform the work; the contract is not “his” to transfer or assign. In the present case all of the managerial know-how, expertise and trade reputation which Jean-Guy Rivard brought to the business of J. G. Rivard Limited disappeared when Jean-Guy went out of the business. This does not mean, of course, that other individuals in the organization necessarily start out “from scratch” when they make the decision to go out on their own; often, as here, they can and will rely on exposure and on contacts that they have made while working in a subordinate position in the industry. Even if, as argued by the applicant, the group led by Michel Rivard did not take all of the steps to set up their own business until they had some form of commitment from Costain to provide some work, this is not an uncommon occurrence amongst individuals contemplating such a move, and falls short of the sort of continuity necessary to find a “sale of a business” from J. G. Rivard Limited to the fledgling group. While the case of *Aircraft Metal Specialists Limited*, [1970] OLRB Rep. Sept. 702, involved some change in the nature of the business. There a group of employees, including the individual who was the President and General Manager of the company going out of business, purchased from the predecessor (Field Aviation) certain of its equipment, leased the same premises, and did, on their own, solicit and obtain former customers of Field. The Board stated that there was “not a continuum between Field and Aircraft in the sense contemplated by the Act”. Here Jean-Guy did, as one would expect, “put in a good word” with Costain for his brother and former employees, but clearly no arrangement or commitment was arrived at with Costain, and that was in no way a condition of Jean-Guy’s decision to discontinue business on his own.

14. The significance of the “key man” to a construction contracting business does not mean that there can never be a “sale of a business” when the original principal sells out (compare *Magnus Engineering*, [1980] OLRB Rep. March 366). It does require, however, a careful analysis of what constituted the “functional economic vehicle” of the predecessor. Certainly the four unwanted trucks leased by Michel fall well short of meeting that definition, and lack that “dynamic quality” necessary to the finding of “a business”. The looseness of the arrangements in transferring the trucks over the first couple of weeks, while being painted, is not surprising (given the relationship between the parties) and their use over this period appeared to be confined to the job-site of Costain, who was fully aware of the organizational changes that had occurred. The new group moved to their own location some 15 miles away (not an irrelevant factor in the residential servicing field), essentially purchased their own equipment, and received no work either through or from Jean-Guy Rivard or his company. The new company is financed solely by a line of personal credit arranged by Michel Rivard with his bank, and Jean-Guy Rivard has no part in that arrangement. Nor does there appear to have been any trading on the name or reputation of J. G. Rivard Limited, apart from, as noted before, any contacts made in the ordinary course of employment with that company. The result in this case ought not to turn solely on the fact that Michel is the brother of Jean-Guy, and that the name “Rivard” continues to be used by the new company. The Board accepts the testimony that people in the industry who were familiar with J. G. Rivard Limited would also have been aware, or been made aware, that Jean-Guy Rivard had gone out of business, and that Michel now was in business of his own. The case of *B. R. Rousseau Plumbing*, Board File No. 1463-80-R, released January 19, 1981, (unreported) involved another of the unionized plumbing contractors in the Ottawa area which went out of business at this time, and represents an interesting parallel to the present case. There also it was the brother of the principal of the predecessor company who spun out in business on his own. The application

was brought solely on the basis of section 1(4) of the Act, but some of the Board's comments are applicable to section 55 as well. In particular, the Board noted in connection with the use of the family name, at paragraph 10:

...With respect to the fourth criterion, that of representation to the public as a single enterprise, 446073 Ontario Inc. trades as Rousseau Plumbing and Heating. The Board not, however, that this is Gerald Rousseau's family name and a name that he is proud of and wants to continue working with in the Ottawa area. However, there has been no attempt to represent to the public that B. R. Rousseau Plumbing [the predecessor] and 446073 Ontario Inc. trading as Rousseau Plumbing and Heating are the same company. These two companies operated from different addresses; never shared the same telephone number; operated out of different premises and 446073 Ontario Inc. has adopted colours for its trucks which are quite different from the colours used by B. R. Rousseau Plumbing on its trucks. On this basis the Board finds that there has been no representation to the public that the two respondents are a single enterprise.

15. Both of these cases may be distinguished from that of *Base Electric Limited*, [1978] OLRB Rep. Feb. 140, where the four brothers making up the predecessor company, the Board found, shared the responsibility for the management and goodwill of the company, and, upon separation, divided up amongst themselves all of the remaining assets, work-in-progress, and warranty work of the company. The present case, in fact, is much closer to *Ralph Ford Electric*, [1974] OLRB Rep. June 388. There an individual in a managerial capacity saw his employer being unionized and decided that he would be better off competing on his own on a non-union basis. When he left he took four other employees opposed to the union, the office secretary, and two trucks plus a quantity of electrical components and work shacks purchased from the predecessor company. He then proceeded to obtain by bid the electrical contracts on the house-building project on which the predecessor company, while he was employed, had begun to work. The Board found no sale of a business to have taken place, within the meaning of *The Labour Relations Act*.

16. In the present case, J. G. Rivard Limited, as all were aware, did not intend to remain in business as a competitor of the new company. Does that alter the result? The Board finds on the facts that it does not (as in *B. R. Rousseau, supra*). While the withdrawal of J. G. Rivard Limited from the field might have made it easier for the new company to obtain work, the fact is that the Costain work, which is the focus of this application, was not going to go to J. G. Rivard Limited in any event. That is precisely why Jean-Guy found himself out of business in the first place. J. G. Rivard Limited, after the alleged "sale" to Michel, retained in all respects the capacity to compete, but was simply not in a position to do so. In order for Michel's new Rivard Plumbing to secure the Costain work, it still had to bid against non-union companies, and its price had to be competitive. J. G. Rivard Limited had no work to transfer, and transferred none. The work that it did have, plus any further service work that it could get, it completed itself. Jean-Guy Rivard or his company derived no benefit whatever from the work that the new company obtained, and Jean-Guy has played no part at all in the affairs of his brother's business. It was the imminent demise of Jean-Guy's company which forced his brother and employees to look elsewhere for their livelihood; we do not find, as the applicant submits, that Jean-Guy decided to go out of business to facilitate the start-up of a new

company. The Board must find on the facts of the present case that when Jean-Guy went out of business, in the manner that he did, with him went the applicant's bargaining rights.

17. The applications are dismissed.

DECISION OF BOARD MEMBER H. KOBRYN;

1. I dissent.

2. This decision stems from the basic principle stated in the preamble of *The Labour Relations Act* which reads:

WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

There is no dispute that this Board believes with recognition that the provincial Legislature is committed to the fundamental policy that collective bargaining rights are not a privilege, not a concession, not a favour, but a basic right which will not be withdrawn from any employee unless there are very serious reasons, and no such serious reasons exist in this case.

3. The evidence in this case shows that the transactions undertaken by the respondents were deliberately undertaken "for the purpose of eliminating a trade union or of undermining a collective bargaining relationship". This evidence was given by Michel Rivard and his two employees, Mr. Genest and Mr. Bisailon, who all quite candidly admitted that they set out deliberately to "go non-union". These same witnesses also indicated that they had been planning and preparing for such a move for some time prior to the actual incorporation of the respondent company, 449637 Ontario Inc., c.o.b. as Rivard Mechanical in June of 1980.

4. One must also consider the transactions between the respondent companies which occurred prior to this application and the actions of the principals of the companies in light of their expressed intention to set up a "non-union shop". There is no question but that the employees were all members in good standing of the applicant prior to the formation of the respondent, 449637 Ontario Inc. In fact, all employees were still members in good standing in accordance with the union's records on the date of the hearing. Therefore, the applicant's bargaining rights have indeed been undermined deliberately by the actions and transactions of the respondents.

5. The issue before this Board in this application is to determine if there has occurred "a transfer of sufficient of the enterprise to constitute a sale of a business", keeping in mind the purpose of section 55. In determining this question, the mere absence of the specific sale of certain factors such as goodwill, trademarks, existing contracts, etc. is not determinative of the issue. In support of this point we must look to *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, at page 698 where the Board stated at paragraph 16:

En route to a determination of the above essential questions the cases offer a countless variety of factors which might assist the Board in its

analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight.

This Board must consider the above-mentioned factors referred to in the *Culverhouse* decision as they relate to the evidence in this case demonstrating that a sale or transfer has taken place. The above-mentioned factors are supported by the following evidence.

I. Presence Or Absence Of The Sale Or Actual Transfer Of Goodwill:

The evidence of Michel Rivard and Jean-Guy Rivard established that the goodwill associated with the Rivard name has been built up over the years by the operation of J. G. Rivard Limited. Since this company ceased its operations at the same time as the respondent company, 449637 Ontario Inc. c.o.b. as Rivard Mechanical, the goodwill associated with the Rivard name was naturally transferred to the second company. The most striking example of this transfer is the fact that the Costain contract was awarded to Rivard Mechanical even though it was not the lowest bid. Michel Rivard also admitted that since his brother has now ceased business, any calls which might still go in to J. G. Rivard Limited would likely now be referred to his company.

II. Customer Lists:

The evidence of Jean-Guy Rivard established that Michel Rivard had full knowledge of all the customers of J. G. Rivard Limited by nature of his position with that company, and if he wanted to “go after” those customers, he was free to do so. Therefore, there has in fact been a transfer of customer lists and the newly-incorporated company is “going after” the former customers of J. G. Rivard Limited and getting their business, e.g. Costain projects.

III. Existing Contracts:

Although the union assumed that there had been a transfer of existing contracts, the evidence of Mr. Lusk and the respondents indicates that this in fact did not occur. However, the union’s confusion is understandable since the employees of the two different companies were working on the same project at the same time and, at one point, using the same vehicles with only the lettering on some of the vehicles covered by paint applied with a roller, but still visible, being the only alteration of same. Although the existing contracts between J. G. Rivard Limited and Costain may not have been transferred or assigned, the subsisting relationship which gave rise to those contracts over the past ten years was transferred to the respondent, Rivard Mechanical, as a result of the understanding between the respondents for J. G. Rivard to “step aside” to allow Rivard Mechanical to be in a position to continue the

relationship with Costain and obtain future contracts, which in the past had gone to J. G. Rivard Limited.

IV. Covenants Not To Compete:

Jean-Guy Rivard, in his evidence, indicated quite clearly that he never intended to compete with his brother's company. The evidence also establishes that he did not in fact ever compete with his brother's company, and in 1980 did not submit any bids on any of the work that his brother made a bid for and subsequently obtained. If this is not a covenant not to compete in form it surely is in substance. Michel Rivard was aware of his brother's intentions not to compete with his company and proceeded to incorporate a new company and enter into financial commitments with the bank, secure in the knowledge that he would not be facing any competition from his brother's company especially with respect to the lucrative Costain work.

V. Any Other Obligations To Assist The Successor In Being Able To Effectively Carry On The Business:

Let us consider at this juncture the leasing of the trucks. It is significant to note that the respondent, J. G. Rivard Limited, disposed of its fleet of trucks at exactly the moment when Rivard Mechanical required trucks for its "new" operation. The evidence of Jean-Guy Rivard and Michel Rivard indicate that these trucks are leased through a company which is owned 50% by Jean-Guy Rivard after they were purchased by a company of which Jean-Guy is the president. Michel Rivard indicated, in his evidence that he was at his brother's company looking to buy trucks when an associate of his brother brought to his attention the fact that he could lease these trucks which had formerly been used in his brother's business and the leases were entered into at that time. These leases were apparently entered into on August 20, 1980, but no explanation is given as to how the employees of the new company operated from August 1, 1980 until August 20, 1980. Although different witnesses had slightly different recollections concerning the repainting of the trucks, my understanding of the evidence was that at one point when the trucks were being used by the newly-incorporated company, they were still bearing the name of J. G. Rivard covered over with paint put on a roller, leaving the name still visible. This fact, coupled with the fact that at least two of the employees drove the same truck before joining the new company, as after joining the new company, that this would seem to suggest that the lease agreements were entered into subsequent to the physical transfer of the vehicles from company to the other. Furthermore, it is the evidence of the employees that they commenced work immediately at the same location, and this would also suggest that they would immediately require the same vehicles as they had been using prior to changing employment to perform such work. Based on the above evidence, it is more reasonable to conclude that the leases were in fact entered into after the vehicles had actually been transferred to the new company. Concerning these trucks, it certainly appears that there was no hiatus or break in their service for one company before commencing work for the second company. The trucks continued to be used by the same employees on the same job sites for the same purposes. In addition, Jean-Guy Rivard's decision to get rid of the trucks at the same time as Michel Rivard required such trucks is more than coincidence, and Michel Rivard would not have taken on the work that he did so quickly if he had not some assurance from his brother that he would have the use of the necessary trucks and equipment they normally carried.

VI. Whether Or Not A Number Of The Same Employees Have Continued To Work For The Successor And Whether Or Not They Are Performing The Same Skills:

The evidence in this respect is uncontradicted. All of the employees of Rivard Mechanical formerly worked for J. G. Rivard Plumbing Limited or Michel Rivard Plumbing Limited. It is noted that Mr. St. Denis worked in a non-union role with Michel Rivard Plumbing Limited until 1979. As a result of the union's previous section 1(4) application, Mr. St. Denis became a member of the union and after that settlement, Mr. St. Denis was put on the payroll of J. G. Rivard Limited and his union dues and benefits were deducted.

The evidence is also uncontradicted that all of these employees are performing the same skills now as they were when they worked for J. G. Rivard Limited. In fact, Mr. Genest has retained his same position as foreman. In addition, the evidence established that there was no hiatus in production or employment for the employees. There was simply what might be termed a payroll transfer. One week the employees worked for J. G. Rivard Limited, the next they were working for Rivard Mechanical at the same job sites doing the same work.

An interesting side aspect of this case is the suggestion by Mr. Jean-Guy Rivard that if an employee is a shareholder of a company, the employer does not have to remit union benefits on that employee. Although this is a false concept of employee status under the *Ontario Labour Relations Act*, it appears from the evidence that Mr. Rivard has convinced the four employees involved in this hearing of this position and that as a result, they have all become shareholders of the new company as they had been shareholders of the old one without knowledge of their union. Also the suggestion that there exists a "profit-sharing arrangement" which somehow might effect the employee's status, is also without foundation in the circumstances of this case. The evidence on this "profit-sharing arrangement" is so deliberately vague as to suggest that it is really a sham or some type of illusory incentive offered by Michel Rivard to the employees to convince them that they are better off under his "non-union arrangement" than with the union proper.

Finally, the evidence shows that the financial backing, incorporation costs and corporate scheme were all entered into by Michel Rivard who has had experience in these matters since 1966, and that the employees have simply gone along with the scheme with Michel Rivard, as they did with Jean-Guy Rivard, after they were told that this would legally permit them to avoid some of their financial commitments associated with the union while still remaining members by paying their dues.

VII. The Existence Or Non-Existence Of A Hiatus In Production As Well As The Service Or Lack Of Service Of The Customers Of The Predecessor:

Once again the evidence is uncontradicted that Rivard Mechanical continues to service the prime customer of J. G. Rivard Limited, namely, Costain, and further that there was in effect no break in production or continuity of service for that customer. It is significant to note that Costain, until 1978, used J. G. Rivard exclusively for its plumbing contracting work in the Ottawa area. Mr. Jean-Guy Rivard testified that Costain was a very loyal company and that he had good relations with the representatives of that company. Mr. Lusk was called as a representative from Costain who also indicated that he knew Michel Rivard and had dealt with him while he was employed by J. G. Rivard Limited or by Michel Rivard Plumbing Limited.

Mr. Lusk's evidence concerning Costain's 1980 program, indicated that they would be finishing the Canadiana I series and also indicated that by January 1980, it was possible to

estimate when that series would finish and the next series commence. The nature of the relationship which existed between Costain and J. C. Rivard and the friendship which Mr. Lusk indicated existed between him and J. G. Rivard Limited was such that Jean-Guy and Michel Rivard by January of 1980 would have had a clear idea as to what Costain's program was going to be for the rest of that year and approximately when bids would be required for the new series. The fact that Michel Rivard incorporated his company on June 19, 1980 shortly before bids were required on the second series is once again not a matter of coincidence.

The evidence of Mr. Bisaillon indicated that Jean-Guy Rivard had spoken to the employees as early as January 1980 to advise them that he would be getting out of the plumbing contracting business in that year. Just two months before this incident, in November of 1979, J. G. Rivard Limited settled a previous section 1(4) application brought by the union, and just two days prior to that settlement, Michel Rivard divested himself of his interest and presidency of Michel Rivard Plumbing Limited; although other employees, namely V. Fournier, J. L. Genest and M. Bisaillon all purchased shares in J. G. Rivard Limited around October 1979, Michel Rivard for a period of seven months studiously avoided any corporate association with his brother's companies. However, in June 1980, only seven months after divesting himself of his corporate interests, he incorporated a new company, 449637 Ontario Inc. c.o.b. as Rivard Mechanical. I firmly believe both Rivard brothers had made their respective plans as early as the fall of 1979. As that time Jean-Guy had decided to get out of the plumbing contracting business, the reason being not so much because of the competition of non-union shops as he alleged at the hearing, but rather because he had other financial interests which were keeping him busy and providing him with whatever income he required. Michel Rivard, on the other hand, had been president of Michel Rivard Plumbing Limited from 1969 through to 1979 until the union became aware of the arrangement between that company and J. G. Rivard Limited to employ non-union plumbers of union jobs. When Michel Rivard divested himself of his interest in Michel Rivard Plumbing Limited, he did so in order to facilitate the setting up of the new "non-union" company.

6. Conclusion re section 55 application: in this case the evidence is uncontradicted that there has been a continuation of the business after the sale. In fact the same employees are performing the same work as they were prior to the sale for the same customer. Also that this transfer of the work was coordinated by Mr. Jean-Guy Rivard and Michel Rivard so that there would be no break in the servicing of the important client, Costain. All the events referred to above support that there was an agreement to transfer the work, the goodwill, the employees, the bookkeeper and the trucks to the successor company for the sole purpose of avoiding the employer's contractual and/or legal obligations with respect to the applicant trade union. Unlike many other decided cases under this section, the anti-union intent is clear in this case. The same respondents had attempted by the vehicle of Michel Rivard Plumbing Limited to avoid their union obligations but in 1979 the union discovered this and the matter was settled. This incident definitely has a bearing on the question of good faith of the respondents in this application.

7. Let us now relate the evidence presented in this case to section 1(4) of the Act which provides that where associated or related businesses are carried on by or through more than one corporation, individual, firm, etc. under common control or direction, this Board may treat the corporations, individuals, etc. as constituting one employer for the purposes of this Act, and I favour the applicant's submissions on this subject matter, which I will restate in detail.

8. Common ownership or financial control: it is clear that the respondent's position throughout the hearing has been that there is no common ownership or control of the respondent's corporations. The respondent states that J. G. Rivard owned and controlled the respondent companies J. G. Rivard Limited and Michel Rivard Plumbing Limited, and that Michel Rivard owns and controls 449637 Ontario Inc. c.o.b. as Rivard Mechanical. The respondents maintain that because there is no overlapping legal control or ownership existing at the present time, this Board should not issue a declaration under section 1(4).

9. There are two responses to the position taken by the respondents. One, section 1(4) does not require that the related activities be carried on simultaneously. The exhibits presented to this Board of the corporate records of all the respondent companies show that Michel Rivard was president and a shareholder of Michel Rivard Plumbing Limited from its incorporation in 1969 until November 12, 1979. There is no dispute as to the fact that Michel Rivard Plumbing Limited is bound by the relevant provincial and residential collective agreements.

10. Michel Rivard owned and controlled Michel Rivard Plumbing Limited from 1969 until 1979. In 1979 he then divested himself of his interest once the union became aware that Michel Rivard Plumbing Limited was supplying non-union plumbers to J. G. Rivard Plumbing Limited. Then, only seven months after divesting himself of his interest in Michel Rivard Plumbing Limited, Michel Rivard then set up the respondent company, 449637 Ontario Inc. c.o.b. as Rivard Mechanical. It is this nexus wherein the common control and ownership is found in this application exists between Michel Rivard Plumbing Limited and 449637 Ontario Inc. by virtue of the fact that Michel Rivard personally was owner and president of Michel Rivard Plumbing Limited and now is owner and president of the numbered company referred to above.

11. In support of this position reference is made to *Brant Erecting and Hoisting* [1980] OLRB Rep. July 945. It will be noted that in the *Brant* case three partners established a steel erecting building and fabricating business which business was subsequently unionized. The partnership ran into financial difficulties in 1978 and in April 1979 the firm ceased to carry on any business at all. In May of 1979 a new company was formed, the sole owner being one of the former partner's wives. The former partner was hired by the company to manage the company's ongoing business activities which were substantially the same as the previous partnership. At page 948 of the decision, the Board reviews the purpose of section 1(4) and states:

Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect, the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another.

The Board goes on in paragraph 13 on page 948 to state that the section does not require the related business activities to be carried on simultaneously and in particular states:

The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment)

may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section 55. This is especially the case in the construction industry where many of the employees will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from job site to job site or place to place, assembling tools, equipment, a labour force as required *after* it has made a successful bid...In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, tradenames, goodwill, employees, etc.

It is important to note the summary in the *Brant* case given by the Board in paragraph 16 where it was stated:

There was hiatus between the apparent demise of Brant Erecting and the launching of Provincial Steel as a going concern. This is not a case in which a "keyman" leaves one employer to go work for another, or establishes a new business of his own in competition with his former employer. Here, the incorporation of Beverly Munro Inc. was undertaken so that Bill Munro could carry on essentially the same business as before. In our view, these transactions fall squarely within the mischief of which section 1(4) is directed, and we are satisfied on the evidence before us that Brant Erecting and Hoisting and Beverly Munro Inc. carrying on business as Provincial Steel, carry on associated or related businesses (albeit not simultaneously) under common control.

It is significant to note that the Board had found earlier that the previous partnership had been dissolved. In this application Michel Rivard Plumbing Limited is still a legal entity even though the evidence of the respondents is that it is not carrying on active business activity since November 1979.

12. It was stated earlier that there were two answers to the respondent's position that there was not common ownership or control. The second answer is that "legal ownership" is in itself not being held to be determinative of the issue. Reference is made to previous quote from the *Brant* decision in support of this proposition where it was stated that legal form is not permitted to dictate or fragment collective bargaining structure. In addition it is interesting to note in the *Brant* decision that the Board makes no finding that there was an intent to undermine the collective bargaining relationship. In this application where the intent to interfere with the contractual and legal obligations of the union is clear, *a fortiori* this Board cannot allow the legal form to dictate and must declare that the respondent, 449637 Ontario Inc. c.o.b. as Rivard Mechanical, is a related or associated employer with Michel Rivard Plumbing Limited and/or J. G. Rivard Plumbing Limited and therefore bound by the provisions of the relevant residential and provincial collective agreements.

13. Other factors in support of the section 1(4) application: in this application I rely also on the evidence reviewed in detail in section 55 application. In addition to that evidence it must

be pointed out that there is common management between the respondents in that Michel Rivard has been employed by all of the respondents (apart from J. G. Rivard (Quebec) Limited) in a management capacity as a supervisor. In that capacity, he established contact with customers and certainly had input as to the direction of those various companies. This common management does not presently overlap simultaneously but by virtue of the wording of section 1(4), this is not necessary before a declaration be issued.

14. In addition to the evidence already referred to under the section 55 application, the fact is that all the respondent companies have common solicitors who have been acting for them from the inception of their corporate existence. The evidence also established that the respondents used common accountants and the bookkeeper for J. G. Rivard Limited is the same as the bookkeeper for Michel Rivard. There is evidence of non-arm's length transactions between the respondent corporations and the principals.

15. As to the interrelationship of the companies, according to Mr. Lusk's evidence, he learned of the existence or proposed existence of the respondent 449637 Ontario Inc. from Jean-Guy Rivard. Jean-Guy Rivard indicated he had discussions with Mr. Lusk concerning the setting up of the second company, doing what he could to assist his faithful employees and his brother to take over the Costain work.

16. It must also be noted that Michel Rivard went to great lengths to attempt to avoid association with his brother's unionized company for the purpose, as he candidly admitted, "to set up a non-union shop". It is also a fact that there was no lay off but the employees simply changed payrolls in August once the new work had to be commenced for Costain.

17. What we have here in this case is a very sophisticated respondent who, from past experience from numerous encounters, has managed to master the legal aspects of our labour relations system and has made a concerted frontal assault on the very principle enshrined in the *Preamble to The Labour Relations Act* and that is to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as freely designated representatives of the employees. These legalized tactics should be viewed for what they really are, a concerted effort to destroy the collective bargaining system and the resulting collective bargaining agreement, and they should not be allowed to succeed.

18. For all of the above reasons I must also reject the Board's decision in the case of B. R. Rousseau Plumbing, Board File No. 1463-80-R, released January 19, 1981 which involved another of the unionized plumbing contractors in the Ottawa area, which went out of business at this time. There also was a brother of the principal of the predecessor company who spun out in business in a similar manner as in this case. This company was mentioned in our case as one of the unionized competitors for the Costain work. The above remarks about the respondents in the *Rivard* case would also apply to the *B. R. Rousseau* case for the same reasons as mentioned above.

19. For the reasons outlined, this application should succeed on both the section 55 and the section 1(4) applications.

0837-79-U Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant, v. Russell MacVicar Limited, Respondent.

Natural Justice – Reconsideration – Respondent failing to comply with Board order – Requesting reconsideration for second time – Whether respondent received fair hearing – Whether Board directing new hearing

BEFORE: R.O. MacDowell, Vice-Chairman, and Board Members B. Armstrong and J. A. Ronson.

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER B. ARMSTRONG; May 15, 1981

1. This is an application for reconsideration of three decisions of the Board dated March 5, 1980, July 7, 1980, and November 3, 1980, in which the Board determined and re-affirmed that the respondent had illegally discharged Robert Martineau, Stan Demmans, and John Impens, and ordered that each of these individuals be compensated for his loss of earnings. Each of these decisions was accompanied by written reasons; however, since this is the second application for reconsideration, it may be useful to review the course of these proceedings in order to clarify the context in which the present application arises.

2. On June 27, 1979, the complainant union applied for certification as the bargaining agent for the respondent's employees. Notices of that application were sent to the respondent and posted on its premises. Following the posting of these notices, Henry Lamotte, the owner of the respondent, assembled the employees in his office and told them that they had a choice: they could either "stick with the company" or "stick with the union". If they did the latter, Lamotte warned that they would be "out". Robert Martineau, and John Impens, were identified by Lamotte as union members and told that, since they had joined the union, they were going to be laid off. Lamotte also warned that other employees would be laid off, unless they revoked their membership in the union. In addition, Lamotte initiated the circulation of a petition which purported to indicate employee opposition to the union.

3. The union was certified following a hearing on July 17, 1979, and by letter dated July 21, 1979, it notified the respondent of its desire to engage in collective bargaining with a view of concluding a collective agreement. Almost contemporaneously with these events, the employees who are the subject of this application were laid off. This, it will be observed, was consistent with Lamotte's earlier threat, and although Demmans and Martineau continued to report for work, they were told that none was available. Lamotte also made a number of remarks indicating that his refusal to employ them was a reprisal for their trade union activities. An individual who is not a trade union supporter, and another person who had initially supported the union but, following Lamotte's meeting, decided to reject it, were retained in the respondent's employ.

4. In early August 1979, the trade union filed complaints on behalf of Robert Martineau, John Impens, Stan Demmans, and Philip Ridgewell, alleging that they had been discharged or otherwise discriminated against because of their support of the union. A hearing before the Board was scheduled for September 19, 1979, and in the meantime, efforts were

made to settle the complaint. In order to facilitate these efforts, the hearing was adjourned and, ultimately, the respondent's solicitors (at the time, the firm of Bartlet and Richardes), and counsel for the union were able to reach what they considered to be an amicable resolution of the matters in dispute. During these discussions, of course, the employees remained without work awaiting a determination of their rights. As it turned out, the solicitors for the respondent were unable to persuade their client to accept the proposed settlement and those solicitors withdrew from the case. Apparently, in addition to rejecting his solicitor's advice, Mr. Lamotte also neglected to settle their account, and this, in turn, gave rise to certain further problems when he sought to retain new counsel.

5. By mid-December, the union concluded that Lamotte was disregarding the rights of his employees, the processes of the Board, and the advice of his own solicitors; and requested the Board to reschedule the matter for a hearing. A new hearing date was fixed for Friday, February 28, 1980. Final settlement efforts prior to that date proved unsuccessful.

6. In early February 1980, Lamotte contacted the firm of Mathews, Dinsdale & Clark with a view to retaining them with respect to these matters. The details of these efforts are set out in the Board's decision of March 5, 1980; and it is unnecessary to review all of them here. It suffices to say that Mr. J. D. Carriere, a member of that firm, was not formally retained but, nevertheless, gave certain advice to Mr. Lamotte, and as a courtesy to him and the Board, appeared on February 29, 1980, to transmit his representations. On Thursday, February 28, 1980, Mr. Carriere was informed by the respondent that his brother had died on February 24, 1980, and that because he was in a state of shock and mourning, he would be unable to proceed with the hearing on February 29. The Board hearing did not conflict with the funeral arrangements. Mr. Carriere advised Lamotte that adjournments were not granted as a matter of course (particularly in circumstances of this case and at such late date), and that he (Lamotte) should be present at the Board hearing in order to speak in support of his request for an adjournment. Despite Mr. Carriere's advice, Lamotte did not appear at the hearing. Mr. Carriere advised the Board what Lamotte had told him and transmitted Lamotte's request for an adjournment but having no instructions, could not take an active part in the hearing.

7. The union opposed the request for an adjournment and led evidence demonstrating that, notwithstanding his brother's death, Mr. Lamotte had continued to carry out his ordinary business activities on the Monday and Tuesday immediately after the death, and on the Thursday following the funeral and immediately preceding the date of the Board Hearing. In the union's submission, Mr. Lamotte's request for an adjournment was without foundation, and his recital of the situation was an attempt to mislead both the Board and his own counsel. In the circumstances, on the basis of the evidence before it, the Board declined to grant an adjournment and proceeded to hear the evidence of anti-union activity and the allegedly unlawful termination of the respondent's employees. The principal features of this evidence are set out in paragraphs 2 and 3 hereof.

8. It was the Board's refusal to grant an adjournment which formed the basis for the first application for reconsideration. For the purpose of that application, the respondent was represented by a new firm of solicitors.

9. The Board scheduled a hearing to entertain the respondent's evidence and representations with respect to the adjournment question, and at that hearing, (held on June 23, 1980) Mr. Lamotte gave *viva voce* evidence. His evidence was far from satisfactory. He testified that

because of his deep sense of loss, he was unable to do *any* work in the days following his brother's death. He testified that he visited the business premises only once, and then only for the purpose of delivering some documents. He clearly, unequivocally, and repeatedly denied *ever* driving a truck during the week, or doing any other manual work about the premises. On cross-examination however, he was confronted with an invoice bearing his own signature and indicating that a load of sewage had been delivered by him to a sanitary land-fill site in Essex County on February 25, 1980 — that is, the day immediately following his brother's death and during the period when Lamotte had earlier claimed he was incapable of working. Subsequently, the Board heard credible evidence, from two other witnesses, that Lamotte had in fact carried on "business as usual" despite his brother's death. Having regard to the demeanour of the witnesses, the manner in which they gave their evidence, and the credibility and consistency of the different versions of events, the Board concluded that Lamotte had not been candid with the Board, had intentionally misrepresented the facts, and that his evidence should be rejected. On the basis of the evidence before it, the Board concluded that Lamotte's bereavement, following his brother's death on February 25th, had not prevented him from carrying on his ordinary business activities, and simply did not support either his original request for an adjournment of the February 29th hearing, or his later request for a reconsideration of the Board's refusal to grant an adjournment. The Board noted that in appropriate circumstances, a death in a party's immediate family might well provide grounds for an adjournment; but the evidence in this case demonstrated that an adjournment was entirely unwarranted.

10. In his request for reconsideration, the respondent also submitted, in the alternative, that he had been confused by the advice of his solicitors and had misunderstood the necessity of his appearing at the original hearing to answer the charges of illegal conduct which had been made against him. Lamotte's version of events differed significantly from that of Mr. Carriere who, although not formally retained, did appear before the Board to advance the respondent's position as well as he could in Lamotte's absence. Carriere told the Board that he had specifically advised Lamotte that an adjournment might not be granted and that he should appear for the hearing in the event that the Board chose to proceed. Lamotte denied that Carriere ever suggested that an adjournment might not be granted and told the Board that he was assured by his solicitors that an adjournment would follow as a matter of course. His failure to attend the February 29th hearing was blamed alternatively on the quality of his solicitors' advice or his own innocent misunderstanding of the situation.

11. The Board was satisfied despite Lamotte's testimony that Carriere had advised him that he should be present, and that Lamotte had simply decided to ignore Carriere's advice (as he had ignored the advice of his previous solicitor) and take a chance that an adjournment would not be granted. of course, even if Lamotte had, *bona fide*, misunderstood his solicitor's instructions, (and the Board was not satisfied that this was in fact the case) this in itself would not necessarily prompt the Board to rehear the matter. (See paragraph 6 of the Board decision dated July 7, 1980.)

12. On the basis of the evidence and submissions of the parties made at the hearing on June 23, 1980, the Board concluded that there was no basis for granting a new hearing or reconsidering its earlier decision that the repondent had discharged certain employees contrary to the Act and should reinstate and compensate them for the wages and benefits which they had lost. In accordance with its usual practice, the Board remained seized of the matter that there was any difficulty in calculating the actual amounts owing to the aggrieved

employees. In most cases, the wages which an employee would have earned had he not been unlawfully dealt with are easily ascertainable, and the parties are generally able to agree on the question of mitigation without the necessity of a formal hearing. In this case, however, there was no such agreement.

13. On September 11, 1980, the Board held a further hearing to entertain the parties' evidence and representations with respect to the quantum of compensation, and the mitigation issue. There were two principal questions raised during this hearing: had the employees made reasonable efforts to mitigate their losses; and, if they had, what was the extent of those losses. The first question turned out to be somewhat easier than the second.

14. The Board was satisfied that the employees had made every reasonable effort to secure alternative employment. In the case of one of the aggrieved employees, those efforts had been successful and his entitlement to compensation was reduced accordingly. The calculation of the amount of compensation owing however, was somewhat more difficult, since Mr. Lamotte put before the Board certain payroll records which he himself indicated did not show the actual hours worked in any given week, but only the hours for which the employees were paid. Lamotte testified that it was not the policy of the company to pay overtime — even if the employees worked more than the forty-four hours per week beyond which overtime is payable by virtue of *The Employment Standards Act*. Instead, he testified, the actual hours worked in any given period would be “moved back and forth” and distributed so that the actual overtime hours would not appear on the face of the records. Lamotte admitted that these records would not indicate the actual hours worked in any given week; yet, it was this unsatisfactory material which was submitted as a basis for determining the amount of compensation owing to the grievors. In the circumstances, the Board considered the records unreliable and preferred to accept the *viva voce* evidence of the employees (which was not seriously contradicted in cross-examination) that they generally worked a forty-seven hour a week. The Board then determined the number of weeks between the unlawful termination and the commencement of a lawful strike against the respondent (on January 2, 1980). This strike was continuing at the time of the first Board decision, and it was accepted by all the parties that it would be the “cut off date” for the compensation award. On that basis, the Board performed the arithmetic calculations upon which its compensation order is based. In determining the sum payable, the Board also included an amount in respect of interest which was calculated on the basis of the formula adopted by Denning L.J. in *Jefford v. Gee*, [1970] 1 All E.R. 1202, and by this Board, in *Hallowell House*, [1980] Rep. Jan. 35. In the result, the Board ordered that the respondent *forthwith* pay to Robert Martineau, the sum of \$4,176.83; to Stan Demmans, the sum of \$2,115.09; and to John Impens, the sum of \$4,970.56. As of the date hereof, the respondent has apparently refused to do so.

15. On December 1, 1980, the Board received a letter from counsel for the complainant which reads as follows:

“In a decision dated November 3rd, 1980, the Board directed the Respondent forthwith pay the grievors the following amounts:

Robert Martineau	\$4,176.83
Stan Demmans	\$2,115.09
John Impens	\$4,970.56

To date, the Respondent had failed to make the required payments.

Therefore, the Complainant respectfully request the Board to schedule a non-compliance hearing."

By a letter dated December 15, 1980, the Registrar of the Board advised the respondent of the union's letter in the following terms:

"I enclose herewith a letter from the complainant which alleges that the respondent has failed to comply with the Board's order dated November 3rd, 1980, directing the respondent to pay the grievors the sums therein set out.

If you have any representation to make with respect to the said submission of the trade union, you must file them with the Board not later than December 29th, 1980.

If you fail to file any submission on or before that date, or if the Board is satisfied on the submission made to it that there has been non-compliance with the said Board order, the Board will file the said order in the Supreme Court pursuant to section 79(5) of The Labour Relations Act.

Very truly yours,"

This letter was addressed to both the respondent, and the two firms of solicitors (McTague, Clark, and Mathews, Dinsdale & Clark) who had most recently acted for the respondent, although it appears that as of the date hereof neither is acting for the respondent. On January 13, 1981, the respondent, on its own behalf, made the following reply:

"We confirm that we have requested that the Labour Relations Board consider granting a new hearing of the award previously made in this matter on the following basis:

1. That apparently, the Board seemed to be under the impression that Russell MacVicar Limited was acting in bad faith by not appearing before the Board for the February 29th hearing. This matter seems to have been compounded by both the failure of Mr. Lamotte to personally attend the hearing as well as failing to have been represented by counsel at the hearing. We would refer you to the letter of Messrs. Bartlet & Richardes, Barristers and Solicitors, dated April 23, 1980, in which Mr. Milton H. Grant of that firm clarifies this situation and in fact comments that it had been Mr. Lamotte's desire to appear before the Board represented by counsel but failed to do so due to circumstances clearly set forth in that letter.

2. That prior to reaching its decision on the matter of the award dated November 3, 1980, the employer was not given a reasonable opportunity to present merits in this matter and in fact the decision of the Board is based on a number of errors of fact. These errors of fact, no doubt arose, due to the failure of the Board to consider evidence which the company

wished to present in this matter, or which evidence, to the extent it was allowed to be presented, was ignored by the Board.

4. After having been advised of the decision resulting from the February 29th meeting, the President of Russell MacVicar Limited, Mr. Henry Lamotte, attended at the Board offices in Toronto and fully discussed its difficulties in this matter with a Ms. Susan Stewart, who at that time was employed by the Board. Various information was given to her in confidence on the understanding that she was going to attempt to help resolve the difficulties and obtain a proper hearing in this matter for the company. At the November meeting before the Board, Ms. Stewart was no longer with the Board but attended the hearing on behalf of the Union as an employee of the Union.

For the foregoing reasons, we hereby request that a hearing be held at which the Board can fully explore all of the merits of this matter and render a just decision. Accordingly, we would ask that you write to us at the earliest date possible in order to advise us of the date at which such a hearing could be held. We trust that it would be possible to arrange a hearing date for a time other than from January 29th to February 15th as Mr. Lamotte will not be available for a hearing during that period of time.

Your cooperation herein would be appreciated.”

This letter in turn was followed by a further letter from the complainant union on behalf of the aggrieved employees:

“I have considered the points raised in the Respondent’s letter dated January 13th, 1981.

It is the position of the Complainant that this further request for reconsideration and a hearing should be denied.

I will not recite the entire history of this complaint. Suffice it to say that, this matter was initiated in 1979. Subsequently, there was a hearing on the merits which Mr. Lamotte failed to attend. In addition, there has been a reconsideration hearing as well as a compensation hearing. The Respondent’s delaying tactics have deprived the grievors of their remedy.

We are now in 1981, the grievors have not been compensated and the Respondent is again attempting to avoid its responsibilities. In our submission, the Respondent is now clearly abusing the Board’s process.

With respect to points one and two in the Respondent’s letter, it is sufficient to say that these matters were raised in previous hearings and adjudicated upon by the Board.

Ms. Susan Stewart did represent the Complainant at the compensation

hearing. She did not represent the Complainant at any hearing dealing with the merits. In no way was it improper for Ms. Stewart to represent the Complainant at the compensation hearing since this hearing had no relationship to any discussion which took place in the past between Ms. Stewart and Mr. Lamotte. No objection was made at the compensation hearing to her presence. In raising a point such as this, the Respondent is merely revealing the ridiculous lengths it is prepared to go in order to avoid its legal obligations.

With respect, the Complainant requests that this further request for reconsideration and a hearing on the merits be denied and that the Board order be filed forthwith."

16. In its letter of January 13, 1981, the respondent does not dispute the fact that it has failed to comply with the Board's order to compensate the employees discharged in or about 1979. The respondent's position is that, for the reasons stated, the Board should grant a new hearing in the matter. Accordingly, the Board considers the respondent's letter to be both a request for reconsideration, and an explanation for its failure to compensate its employees. Whichever way the matter is viewed, it is necessary to consider the points raised and determine whether they support the respondent's contention that the proceedings should be reopened, *de novo*. The first two submissions are related to the determination of liability. The third submission is related solely to the hearing in which the Board calculated the amount of compensation payable; but unlike the first two, it raises a more general concern. It will be convenient to deal with each of these matters in turn.

17. The respondent submits that the Board concluded that the company was acting in "bad faith" by failing to appear at the initial hearing. The respondent further submits that in reaching its decision dated November 3, 1980, (i.e. the decision concerning the amount of compensation payable) the respondent was not given a reasonable opportunity to present its evidence or, in the alternative, the Board failed to consider the respondent's evidence. With respect to these first two submissions, the Board can only reiterate its principal findings, based upon the evidence adduced at the February 29th, and June 23rd hearings. These are as follows:

1. the respondent had ample notice of the February 29th hearing;
2. the notice of hearing warned the respondent that if it failed to appear, the Board might proceed in its absence;
3. the respondent was informed by its solicitors that it should appear at that hearing to meet the case which was being made against it;
4. that despite this advice, the respondent chose not to appear;
5. that there was no basis for granting an adjournment of the February 29th hearing, because, notwithstanding the death of Mr. Lamotte's brother five days before, he continued to carry on his ordinary business in the days immediately following his brother's death and there was no reason why he could not have attended the Board hearing;

6. that upon the request for reconsideration, Mr. Lamotte gave evidence which was patently false and intentionally sought to mislead the Board as to the facts of the case;
7. that Mr. Lamotte was not in fact, and could not reasonably have been misled by his solicitors as to the necessity of his attendance at the Board hearing dated February 29, 1980.

The Board considered the letter from the firm of Bartlet and Richardes, dated April 23, 1980, but notes that no one from that firm appeared to give evidence with respect to its contents, nor has that firm taken an active part in any of the proceedings. In the circumstances, the Board based its decision upon the submissions of Mr. Carriere, and the testimony of Mr. Lamotte, and the various witnesses who observed him carrying on his ordinary business activities at a time when he alleges he was so bereaved that he was unable to do any work or attend a Board hearing.

18. The November 3, 1980, decision was solely concerned with the qualification of damages and in respect of that matter, the respondent was given a full opportunity to present any evidence which it wished to lead on the issue — as it was, with respect to its request for reconsideration. The Board carefully considered all of the evidence which the respondent sought to lead but, as we have already pointed out, we did not find Mr. Lamotte's evidence credible and, at the compensation hearing, we chose to prefer the *viva voce* evidence of his employees, over the business records which he himself admitted were inaccurate. The employee evidence respecting mitigation was not seriously challenged, nor was there any doubt about the wages they were making before their termination, or the number of days which had elapsed between that termination and the commencement of a lawful strike on January 2, 1980. The employees testified, and the Board accepted, that prior to their termination, they were working approximately forty-seven hours per week. This was the basis on which the Board performed the calculation of compensation which yielded the amounts mentioned in paragraph 14 above. In our view, there is nothing in the respondent's most recent submission which raises any doubt as to the method of calculation or the factual foundation upon which it was based. Indeed, it is difficult to see how there could be. Having found that the employees had taken reasonable steps to mitigate their losses, it was simply a matter of arithmetic to calculate the amount they would have made, had they not been terminated. The details of that calculation are fully set out in the Board's decision of November 3, 1980.

19. The third submission made by the respondent raises different considerations. This submission involves the appearance at the November (compensation) hearing of Ms. Susan Stewart, who had formerly articulated to the Board's solicitor. Mr. Lamotte asserts that following the initial decision of the Board on March 5, 1980, (i.e. the original Board decision establishing the respondent's liability and declining to grant an adjournment) he attended at the offices of the Board and spoke to Ms. Stewart about his problem. At about this time, he also had some contact with Bartlet and Richardes (and perhaps with Mathews, Dinsdale & Clark), and by April 10, 1980, had retained McTague Clark to represent his interests. For the purposes of this decision, the Board will accept Lamotte's submission at face value — however, the Board notes that he gives no indication of the nature of the "confidential information" allegedly conveyed, nor how its use was detrimental to him, or how it was even relevant to the question of mitigation or how much his employees would have made, had they

not been terminated. None of those questions had even arisen at the time of his discussion with Ms. Stewart.

20. Essentially, (although the respondent does not put it quite this way) it is argued that either the respondent was unfairly prejudiced because of Ms. Stewart's knowledge of its affairs, or alternatively, the Board was biased because of Ms. Stewart's former connection with it. Again, it will be useful to review the facts focusing on those matters which either are not, or cannot now be disputed.

21. Ms. Stewart was articulated to the Board's solicitor at the time of its first decision, and Mr. Lamotte apparently consulted her as to what could be done about it. Whether as a result of this discussion or otherwise, Lamotte subsequently retained new counsel, applied for reconsideration, and set in motion the series of hearings to which we have already referred. The request for reconsideration was rejected following a hearing. No mention of this contact with Ms. Stewart was raised at that hearing. Some months later, (and several months after she had completed her articles) Ms. Stewart appeared on behalf of the aggrieved employees at the hearing where the amount of compensation owing to them was determined. No objection was taken to her presence or participation at the hearing. That presence is now the basis for a request for a *full* reconsideration of all issues in the case — including those resolved by the two earlier hearings and decisions of the Board.

22. We do not think this matter can be considered in the abstract. In our view, Mr. Lamotte's request for a full hearing *de novo* must be dealt with in the particular circumstances of this case.

23. The proceeding in the present case has been ongoing before the Board since August 1979. It is almost two years since the grievors have been discharged, and more than a year since the Board found that their discharge was unlawful. The respondent had notice of the original hearing, had advice from at least one, and perhaps two firms of solicitors, and, for the reasons given by the Board in its decision of March 5th, (and summarized above) the Board found that there had been a breach of *The Labour Relations Act* and ordered that the grievors should be compensated. Ms. Stewart had no involvement in that determination. The respondent refused to compensate its employees and, as was its right, retained new counsel and sought reconsideration. It was shortly after the initial finding of liability that the alleged meeting with Ms. Stewart took place. Subsequently, the Board scheduled a second hearing where the respondent was represented by counsel and given an opportunity to lead evidence and make submissions as to why the Board should reconsider the case and rehear that matter *de novo*. Following the dismissal of that application, the respondent still refused to fully compensate the employees and, again, as was its right, came back before the Board for a quantification of the amount of compensation owing. That hearing involved an assessment of the grievor's efforts to mitigate their losses, an arithmetic calculation of the amount that they would have earned had they not been illegally terminated, and certain evidence which the respondent led concerning the conduct of its business.

24. At the "compensation hearing", the question of liability was not relitigated, and it is difficult to see what Mr. Lamotte could have told Ms. Stewart some six months previously (and after the initial Board decision) which could possibly prejudice him or affect the outcome of the compensation hearing. The evidence of mitigation was that of the grievors themselves and, bearing the onus on the compensation question, the trade union proceeded first. The

evidence on which the Board based its arithmetic calculation was also that of the grievors, since the Board accepted Lamotte's own evidence respecting the inadequacy of his business records. In neither case, did the union's position or the evidence upon which the Board's finding was based involve "confidential business information" of the respondent. The respondent was also given a full opportunity to lead its own evidence — the character of which is more fully set out in the Board's decision of November 3rd. In the result, however, the Board did not find that evidence persuasive or supportive of the conclusion (i.e. that the employees were not entitled to any compensation) urged upon us.

25. We cannot see how the respondent could have been prejudiced by Ms. Stewart's presence and any "confidential" information which she may have had, and certainly there was no indication at the hearing that she was in possession of any "insider" knowledge which would not have been known to the employees who worked for the respondent. It was not reflected in the character of the complainant's evidence or in cross-examination. It was Lamotte himself who tendered his payroll records and a portion of his production records. Moreover, if the respondent was concerned about the potential for unfairness, the matter could, and should, have been raised at the hearing itself. The respondent was aware of the meeting with Ms. Stewart and could directly, or through counsel, have brought its concerns to the Board's attention. He did not do so; and surely a party which is aware of an issue such as this, cannot remain silent and allow the hearing to proceed, without risking a finding that it has waived its right to complain.

26. Section 95 of *The Labour Relations Act* gives the Board the broadest possible discretion to reconsider its own decisions where it considers it just or appropriate to do so. Indeed, it was pursuant to section 95, that the Board scheduled the second hearing in this matter so that Mr. Lamotte would have an opportunity to explain why he had failed to attend the original Board hearing, and why a new hearing should be granted. It was at that first reconsideration hearing that Mr. Lamotte misrepresented the facts and sought to mislead the Board, and, in the circumstances, the Board was not persuaded that there had been any denial of natural justice. Similarly, in all of the circumstances of this case, the Board does not consider it necessary, appropriate, or just to schedule a further hearing in this matter or otherwise reconsider the findings of fact which it has made. There are a number of countervailing considerations, including: Lamotte's failure to raise his latest concern in a timely fashion; his attempt to mislead the Board; the overwhelming likelihood that a further hearing on the matter of compensation would not reach a different result because the facts upon which the finding was based are either undisputed or beyond dispute and, in any case, have nothing to do with Ms. Stewart or any "insider information" she may have had; and, finally the balance of convenience, and the interests of the aggrieved employees, who, as a result of the respondent's initial misconduct were out of work, without income for many months, and still have not been compensated. The Board sees no reason why they should bear the burden of yet another hearing.

27. Since it is not disputed that the respondent had failed to comply with any part of the Board order, and, there being no dispute in this regard, the Board sees no reason why its order should not be filed in Court so that the employees can pursue the enforcement mechanism provided for in the statute. For the foregoing reasons, the Board directs that its order be prepared in the prescribed form, and filed in the Court forthwith.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. As set out in the majority decision, the respondent employer was found to have violated the Act. It was ordered to pay certain damages to various employees. It has not paid these damages and the trade union has requested that the Board file its order with the Supreme Court of Ontario so that the order may be enforced.

2. The employer has requested a hearing in order to show cause why it has not complied with the Board's order. It has raised various matters that have been dealt with in an earlier application for rehearing, but has raised a new ground of complaint as follows:

"After having been advised of the decision resulting from the february 29th meeting, the President of Russell MacVicar Limited, Mr. Henry Lamotte, attended at the Board offices in Toronto and fully discussed its difficulties in this matter with a Ms. Susan Stewart, who at that time was employed by the Board. Various information was given to her in confidence on the understanding that she was going to attempt to help resolve the difficulties and obtain a proper hearing in this matter for the company. At the November meeting before the Board, Ms. Stewart was no longer with the Board but attended the hearing on behalf of the union as an employee of the union."

3. In view of the allegation that the employer has been prejudiced in some way before the Board by the actions of Ms. Stewart, it seems to be that natural justice dictates that the Board schedule a hearing and allow the employer to present whatever evidence and make whatever representations it may have with respect to this one particular allegation.

0100-81-M William F. Morgan, Applicant, v. Bakery, Confectionary and Tobacco Workers International Union Local Number 284 : Mr. Don Szmon, Respondent, v. **The Shaw Bakery Company Limited**, Respondent.

Religious Objectors – Applicant's bona fides undisputed – Applicant becoming employee in bargaining unit in 1977 – Union security clauses existing for many years prior to 1977 – Whether conditions of section 39 met

BEFORE: George W. Adams, Chairman, and Board Members D. B. Archer and J. Wilson.

APPEARANCES: *William F. Morgan on his own behalf; and Morris Zimmerman and Wayne Clarke for the respondent trade union; and no one appearing for the respondent employer.*

DECISION OF THE BOARD; May 19, 1981

1. The applicant has applied for exemption on the grounds of religious conviction or belief from the union security provisions in a collective agreement.

2. The employer and trade union have had a collective bargaining relationship for many years and the union security provision of their collective agreements have remained unaltered for at least the last ten years. The applicant was hired May 2, 1977 and is a driver/salesman. On joining the employer he became a member of the union as required by the collective agreement and has paid union dues. He is a member of the Marathon Baptist Church and is a deacon. Some time after December 1980 and for reasons not relevant to this application, he concluded that his association with the respondent union was inconsistent with his religious beliefs. Moreover, he has been advised recently that he cannot remain a member of his church if he continues as a member of the union. The respondent union does not contest the bona fides of his religious beliefs. It does, however, dispute the Board's jurisdiction to grant an exemption.

3. Section 39 of *The Labour Relations Act* provides:

39.-(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause (a) of subsection 1 of section 38 do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually

agreed upon by the employer and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part 1 of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection 1 applies,

(a) subject to clause (b), to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection 1 is first entered into with that employer and only during the life of such collective agreement;

and

(b) where a collective agreement in force before the 15th day of February 1971 contains the provision mentioned in subsection 1, to employees in the employ of the employer on the 15th day of February, 1971 and only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement when clause (a) applies, or on or after the 15th day of February, 1971, when clause (b) applies.

4. It can be seen from subsection 2 of section 39 that the Board may order that an employee be exempted from both union membership and related obligations only for the life of the first collective agreement containing such provisions and provided that the applicant employee was in the employ of the employer at the time that collective agreement was entered into. On the facts before us in the instant case, the applicant has not brought himself within these requirements.

5. The application is dismissed.

1751-80-R: United Food & Commercial Workers' International Union, Local 633, AFL-CIO-CLC, Applicant, v. **Vaunclair Meats Limited**, Respondent, v. Group of Employees, Intervener.

Sale of a Business – Whether respondent acquired part of business – Meaning of “part of business” reviewed – Whether character of business substantially changed – Whether inappropriateness of applying collective agreement governing factor

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members H. J. F Ade and M. J. Fenwick.

APPEARANCES: *H. Caley for the applicant; W. Herridge, Q. C. for the respondent; A. Wilkinson for the interveners.*

DECISION OF THE BOARD: May 4, 1981

I

1. The name: “Vaunclair Meat Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “Vaunclair Meats Limited”.

2. This is an application under section 5 of *The Labour Relations Act*. The applicant union contends that “the business”, or “part of the business”, of Vaunclair Purveyors Company Limited has been transferred to Vaunclair Meats Limited. The union had an established collective bargaining relationship with Vaunclair Purveyors. It is argued that Vaunclair Meats must now recognize these bargaining rights.

3. The first question which must be determined is whether Vaunclair Meats can be said to have acquired all or “part” of the business of Vaunclair Purveyors. If it has, it is required to recognize the union's bargaining rights. In order to answer this question, however, it is necessary to set out something of the predecessor's history, and the business context in which it operated. The evidence before the Board was that of J. O. Hurlburt, who was corporate secretary and executive vice-president of Vaunclair Purveyors, and is now corporate secretary and treasurer of Vaunclair Meats.

4. A “purveyor” is the last link in the meat processing chain prior to distribution of the product to the hotel, restaurant and institutional (HRI) trade. A purveyor makes the meat “oven-ready” by fabricating and, if necessary, portioning both solid meat, and ground meat products. The primal rib is purchased from the packer, reduced in size (i.e., removing fat and bone), trimmed to be suitable for roasting or “steaking” and, portioned into cuts of a predetermined portion weight. This process involves a fabricator butcher who takes the primal cuts and reduces them to either an oven-ready or portion-ready state; then if they are also to be portioned by the purveyor, the “portion-ready” cuts are given to a portion-butcher who reduces them to the specified portion weight. The portion-butcher is a highly skilled tradesman who must perform his task with a considerable degree of precision and accuracy. After the product leaves the hands of the portion-butcher it goes to the “packer” who, as the name suggests, wraps the meat, puts it in boxes, and labels the packages. These are then sent to the cooler area where they remain until they are delivered to the HRI customers.

5. From the early 1950's, Vaunclair Purveyors was part of a corporate family controlled by Ben Winbaum (now president of Vaunclair Meats and formerly president of Vaunclair Purveyors) and Donald McKeown. This corporate family included Winco Limited. Winco ran a number of cocktail lounges, snack bars, and a chain of restaurants bearing the now familiar names of "Steak N' Burger" and "Rib of Beef". Hurlburt became active in the organization in 1956, and eventually became a shareholder, director and officer. Control of the two companies remained in the hands of a common "control group" of shareholders.

6. Because of the close corporate links with Winco Limited, Vaunclair Purveyors supplied one hundred per cent of Winco's requirements. These requirements accounted for about forty per cent of the Vaunclair Purveyors' sales. The remaining sixty per cent involved supplying meat to customers such as Ed's Warehouse, the Three Crowns Restaurant chain, Franklin Butchers, and Jim B's Food Limited which runs the Gentleman Jim Restaurants. Like Winco, some of these customers had corporate relationships with the owners of Vaunclair Purveyors, and in consequence were required to purchase their meat from that company. Vaunclair Purveyors operated from 50 Upjohn Road in Don Mills until June 1979, when it moved to a new plant on Milliken Blvd. in Scarborough.

7. In July, 1976, the Cara organization acquired control (50.01%) of both Winco and Vaunclair Purveyors. In acquiring Vaunclair Purveyors, Cara initially sought merely to cement the source of supply to its new acquisition (Winco); but later, Vaunclair Purveyors began to supply the needs of other Cara operations. Cara had its own established restaurant business providing food services in railway terminals, airlines and commercial complexes throughout Canada. Vaunclair Purveyors began to supply these outlets, but still kept many of its "non-Winco" and "non-Cara" customers. The volume of business with these customers remained the same; however, this volume was a much smaller proportion of the now significantly expanded business.

8. In 1977, Cara acquired Food Corp. which, inter alia, ran the "Harvey's" and "Swiss Chalet" chains. Shortly thereafter, Vaunclair Purveyors began to supply the ground meat products used in the Harvey's operation. By this time, some ninety-three per cent of the gross sales of Vaunclair Purveyors involved Cara, Winco, or related companies. Winco accounted for some twenty to twenty-five per cent. The "non-Cara" customers which had once been a significant part of the Vaunclair Purveyors' business, were reduced to some seven per cent of the total business.

9. In July 1976, when Cara acquired control of Winco and Vaunclair Purveyors, there were approximately forty employees at the Upjohn Road location. This number was increased to about fifty when the company moved to its new plant on 95 Milliken Blvd. in Scarborough. The employee complement increased to about seventy when the plant was operating at its peak in or about January 1980, but had declined to between forty and fifty employees when it finally shut down on September 30, 1980.

10. The move to the new plant had been planned for several years and had been based upon projected sales volumes which, in the result, did not materialize. The company had even built the plant a little bigger than necessary, in order to accommodate anticipated growth; but instead of growth, it faced decline. The general stagnation of the economy had an impact on the HRI trade, while increases in beef prices prompted customers to diversify their menus and reduce the number of high cost meat items. The delay in building the plant significantly

increased its capital costs, and start-up expenses were much greater than anticipated. Finally, at about the same time, interest rates began to escalate. As a result, in the fiscal year ending March 31, 1980, Vaunclair Purveyors lost almost one half million dollars. This loss absorbed virtually all of the company's retained earnings, and it was eventually decided that the only solution was to shut down the operation in order to avoid further losses.

11. On August 22, 1980, employees were notified of an impending shut down which was scheduled to take place on September 30. They were given three weeks' pay in lieu of notice, and efforts were made to find them alternative jobs in other firms. (About fifty per cent of the employees were successful in finding other jobs after the plant closed on September 30.) These terms were not entirely acceptable to the employee group and, after a brief wildcat strike, were improved. As part of the settlement of that strike the employees through their union agreed to continue working until September 30, and to execute a written release of all further claims on the company which was also to be signed by a representative of the trade union. It is not clear whether such releases were, in fact, executed.

12. Coincidental with the shut down of the operation, was a sale of the minority shareholders' holdings to Cara. Cara thus became the solo owner of Vaunclair Purveyors; but, by this time, it was acquiring a corporate vehicle with no ongoing economic activity. The only asset of Vaunclair Purveyors was its interest (through a joint venture) in the land, premises and immovable equipment at the 95 Milliken Blvd. location. Much of the fixed equipment could not be economically removed (refrigeration equipment for example), and Cara apparently hoped to lease the premises to another meat producer or other enterprise which could profitably utilize it. Cara had no intention of continuing in the meat business, and released Vaunclair Purveyors from the non-competition covenant by which it was originally bound. Cara also permitted the original principals of Vaunclair Purveyors (later the principals of Vaunclair Meats) to use the "Vaunclair" name and logo. The current Vaunclair delivery vehicles continue to carry that name.

13. Hurlburt and Winbaum recognized that the key employees of the Vaunclair Purveyors organization represented a human capital asset which would be lost if the organization were entirely broken up. Hurlburt and Winbaum had initiated a number of "new" businesses over the years, and they began to explore the possibility of a smaller new venture built around this nucleus. After some market research to determine its viability, they decided that they could continue to service many of their old "non-Cara related" customers through what Mr. Hurlburt described as a meat products "distribution house".

14. The basic difference between a traditional purveyor and a "distribution house" lies in the elimination of much of the fabricating which would ordinarily be done by the purveyor. In a distribution house operation, the firm attempts, as much as possible, to purchase meat products which have already been through the fabricating stage and can then be packaged and sold to the customer without significant alteration (i.e., cutting, trimming, etc.). While virtually all of the meat passing through Vaunclair Purveyors was processed, only about fifteen per cent of the meat passing through Vaunclair Meats is processed - and most of this involves portioning or mechanical tenderizing. Vaunclair Meats hopes that even this proportion will be reduced, although it will not be eliminated entirely. The production and portioning of ground meat was to be (and is) a minor part of the new operation - in marked contrast to the situation prevailing when Vaunclair Purveyors was the principal supplier for the Harvey's hamburger chain. On the other hand, the two skilled "portioning butchers" hired

by Vaunclair Meats are performing very much as before, and the product still has to be wrapped, packaged, labelled, dated, stored temporarily in the freezer area, and delivered, - again, in much the same manner as before. Of course, the purchase of products which have already been prefabricated, and the significant reduction in volume, have reduced the need for employees, and have made it necessary for the employees of Vaunclair Meats to be "multi-purpose individuals" - that is, each performing a range of functions which in the larger, Vaunclair Purveyors organization would have been performed by several individuals in different job classifications. The fact remains, however, that the old customers of Vaunclair Purveyors from the pre-Cara and pre-Winco days continue to be served very much as before. Indeed, upon the shut down of Vaunclair Purveyors, the new entity, Vaunclair Meats, acquired approximately one hundred and seventy thousand dollars worth of meat inventory which it used to continue to supply these customers before its own organization got fully underway. As Hurlburt put it, there was a hiatus in production, but no hiatus in service.

15. There is a substantial similarity between the principals and officers of Vaunclair Purveyors and Vaunclair Meats. Winbaum and Hurlburt were the key "non-Cara" shareholders of Vaunclair Purveyors, and it is they who control Vaunclair Meats. Ben Winbaum is the chairman and president of Vaunclair Meats, and was chairman and president of Vaunclair Purveyors. Jack Hurlburt is secretary and treasurer of Vaunclair Meats, and was secretary and vice-president of Vaunclair Purveyors. Erich Poehlman was vice-president of production of Vaunclair Purveyors and holds the same position in Vaunclair Meats. Violet Szentkuthy was "office manager" for Vaunclair Purveyors, and in Vaunclair Meats has the title of "comptroller". Indeed, with the exception of a salesman hired after these proceedings began, all of the employees of Vaunclair Meats are former employees of Vaunclair Purveyors - although, as we have already pointed out, their functions may have changed somewhat in the new circumstances. Fred Wilkinson who was a driver with Vaunclair Purveyors, remains a driver with the new company, and also performs some more general duties. He is assisted in this by Steve Roth, who was a foreman in the shipping and receiving department of Vaunclair Purveyors. Violet Szentkuthy, who was the office manager of an office of five employees in the Vaunclair Purveyors' organization, is the single office and clerical employee of Vaunclair Meats. J. Argyris and L. Kataris, who were portion-butchers with Vaunclair Purveyors, perform the same function for Vaunclair Meats. (Erich Poehlman, the vice-president of production, now also does more general duties, such as fabricating meat products which do not meet the company's delivery specifications.) In addition, the new venture has fired certain temporary or part-time employees, or were former employees of Vaunclair Purveyors. Mr. Hurlburt testified that the new company has tried to recruit former employees of Vaunclair Purveyors but, since the venture is still somewhat speculative, has been reluctant to ask former employees to leave settled situations.

16. The new venture continues to operate from the Milliken Blvd. location utilizing approximately twenty per cent of the space formerly used by Vaunclair Purveyors. Vaunclair Meats pays a monthly rent either to Vaunclair Purveyors or directly to the Cara organization. The Board accepts Mr. Hurlburt's evidence, however, that the new company originally intended to seek other premises, and may still do so when this proceeding is completed.

17. As we have already mentioned, many of the customers of Vaunclair Meats were customers of Vaunclair Purveyors both before, and after, the Cara take over. Twenty-five of the thirty customers of Vaunclair Meats are the same. Five are new. Seventeen were, and are, controlled by the Winbaum-Hurlburt interests, so that they are required to purchase their

meat requirements from Vaunclair Meats as they previously were from Vaunclair Purveyors. These customers are being served in much the same manner as before, although because of the significant decrease in the volume of business of Vaunclair Meats, their relative significance to Vaunclair Meats is more closely analogous to what it was in the years prior to the Cara take over, when they made up some sixty per cent of Vaunclair Purveyors' business. Approximately eighty per cent of the business of Vaunclair Meats is accounted for by these old customers. The seventeen "controlled" customers account for fifty per cent of the poundage of meat products produced. There has, however, been a considerable change in the product mix. The Harvey's chain required significant volumes of ground meat products and these products accounted for a large proportion of the sales of Vaunclair Purveyors (whether measured by production or dollar value). Vaunclair Meats, on the other hand, produces only a very small proportion of ground meat products as a service and convenience to its core customers. Ground meat products are not a significant component in its production process or revenue base.

18. Vaunclair Meats was incorporated at about the same time as the Vaunclair Purveyors' operation shut down. There was no hiatus for the five or six employees who became part of Vaunclair Meats. They received their severance pay and, presumably, terminated their employment with Vaunclair Purveyors on September 30 with the rest of the employees; however, they continued to work in the same location as the new organization got underway and appeared on its first payroll in mid-October. As we have already mentioned, the former customers of Vaunclair Purveyors, which became the customers of Vaunclair Meats, received deliveries to the account of Vaunclair Meats out of meat products which had been acquired from the inventory of Vaunclair Purveyors. The "lion's share" of the some 1.2 million dollars worth of inventory went to the F. G. Bradley Company; however, the approximately ten per cent of the inventory acquired by Vaunclair Meats was sufficient to serve its customers while it was getting underway.

19. The evidence concerning the actual value of equipment acquired from Vaunclair Purveyors is somewhat unclear. Hurlburt testified that when Vaunclair Purveyors moved to the 95 Milliken Blvd. location almost all of its equipment was purchased new, but it remains uncertain what value should be placed upon that portion of this equipment which was transferred to Vaunclair Meats a little over a year later. The Board heard evidence of some sixty-six thousand dollars in vehicles and one hundred and seventy-nine thousand dollars in meat inventory, but it also appears that Vaunclair Meats acquired certain calculators, office equipment, packaging equipment, butcher tables, scales, racking, and lab equipment. In addition, by occupying a portion of the Milliken Blvd. premises, it acquired the right to use such refrigeration and other equipment as could not economically be removed. Perhaps the best statement of the situation is that of Mr. Hurlburt. He testified that about eighty per cent of the assets of the new company were acquired from Vaunclair Purveyors, (although this eighty per cent represents only five per cent of the assets in the latter company). As in the case of the meat inventory, the lion's share of the assets, (and, in particular, an expensive automated patty line formerly used to serve Harvey's) was transferred to F. G. Bradley.

20. Counsel for the applicant union stressed the importance of the acquisition of the Vaunclair name, but the evidence suggests that we should not attach much significance to this factor. Hurlburt testified, and we accept, that the goodwill allegedly associated with the Vaunclair name was in fact associated with Ben Winbaum. A number of the customers, as we have already pointed out, were not free to purchase where they pleased in any event; and we

accept Mr. Hurlburt's evidence that the remainder were more influenced by Mr. Winbaum's reputation than the corporate name. Vaunclair Meats did acquire "Purveyors" goodwill; but this resulted more from the similarity of the principals than the acquisition of the corporate name.

II

21. The principle statutory provisions governing "successor rights" are as follows:

55(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.
- (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.
- (5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection 2 becomes bound by the collective agreement, or within sixty days after the trade union council of trade unions has given a notice under subsection 3, terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

22. When a business or part of a business is transferred or disposed of, the transferee acquires it subject to the collective bargaining obligations of the transferor. A union holding bargaining rights for the employees of the transferor retains those bargaining rights for the employees in a "like unit" to that which existed prior to the transfer, and the transferee must continue to apply the collective agreement to that unit until the Board otherwise declares. This transfer and continuation of bargaining rights happens automatically upon the sale of all, or part, of the transferor's business. The Board may terminate the union's bargaining rights if

the successor employer significantly alters the character of the business or part of a business acquired; however, until the Board otherwise declares, the transferee stands in the shoes of his predecessor with respect to established bargaining obligations. In this sense, a union's bargaining rights are in the nature of a vested right, which, by statute, "runs with the business".

23. The legislative history of the successor rights legislation has recently been reviewed in *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193; and it is unnecessary to reiterate that review here. In *Aircraft Metal Specialists Limited*, [1970] OLRB Rep. Sept. 702, the Board succinctly summarized the purpose of section 55 (then 47a):

"A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business."

More recently, in *More Groceteria Limited*, [1980] OLRB Rep. April 486, the Board had occasion to comment more generally on the problem posed by section 55 application and the conflicting interests which the Legislature has sought to harmonize. These issues were discussed in a long passage to which we might usefully refer:

"15. Section 55 of *The Labour Relations Act* is a very important part of the legislation guarding against the subversion of acquired collective bargaining rights and providing some permanence to them in an otherwise volatile commercial context. In the former respect, it is assisted by the various unfair labour practice sections of the *Act* together with section 1(4) which permits the Board to treat as one employer a business carried on through more than one corporation where there is a common control or direction and whether or not these businesses are being carried on simultaneously. An interesting early example of this unfair labour practice aspect of the provision can be found in the important *Thorco Manufacturing Limited* 65 CLLC ¶16, 052 case, a case that today could be just as fairly dealt with under section 1(4). However, this purpose of the provision is not applicable in the facts at hand. We are satisfied that the relationship between the respondent(s) and Loblaws has been arm's length and there is no evidence that the subject commercial transactions were other than for bona fide business purposes.

16. Unfortunately, however, the latter function of the section - providing some permanence to collective bargaining rights - is often the most difficult to apply. Here the Legislature has determined that the objectives of labour relations policies require that the rightful

prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by protection to the employees from a sudden change in the employment relationship. Indeed, the transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees and their representatives are assured of some real measure of continuity in the collective bargaining process by operation of law. So strong is the basis to this policy that the Supreme Court of the United States arrived at a similar conclusion without the benefit of a specific statutory provision like section 55. See *John Wiley & Sons Inc. v. Livingston*, [1964] 376 U.S. 543, 84 S.Ct. 909; Goldberg, *The Labour Law Obligations of a Successor Employer*, [1969], 63 N.W.L. Rev. 735; Note, (1966), 66 Col.L.Rev. 967; Note, (1969), 82 Harv.L.Rev. 418. This ongoing nature of collective bargaining agreements underlines again that such documents are not "ordinary contracts" nor are they in any real sense the simple products of consensual relationships. See *McGavin v. Toastmaster Ltd. v. Ainscough et al* [1976] 1 S.C.R. 718; 54 D.L.R. (3d) 1 Laskin, C.J.C. It is against these impressive policy considerations that the Board must give meaning to and apply section 55.

17. The fundamental issue in cases of this kind is the threshold determination of the section: Has a business been sold? The term "sells" is defined to *include* "leases, transfers; and any other manner of disposition". This all embracing definition obviously reflects the labour relations policy considerations discussed generally above. To repeat, collective bargaining rights are not to be treated as co-extensive with commercial ownership and, to this extent, labour law policy seeks to insulate industrial relations from disruption by necessary and inevitable interaction in the market place. The term "business", on the other hand, is simply defined to *include* "a part or parts thereof". No similar exhaustive definition was attempted by the Legislature in recognition, we think, of the great diversity in commercial affairs and the resulting need for a case by case elaboration of the term in the light of labour law policy. A brief perusal of the many factual situations giving rise to the Board's jurisprudence bears testimony to the wisdom of this legislative choice. Accordingly, at the outset of reviewing a few of the cases that have applied the term "business" in the context of retail food stores, it should not be surprising to learn that the Board in determining whether a business has been sold has not deferred to the commercial documentation employed; has not been influenced by the use of intermediary agents to effect transfers; and has made workplace assessments with respect to the continuity of a particular enterprise, activity, or service arriving at conclusions that a court of law in a commercial matter might not arrive at, but conclusions which are fair to both the statute and context under review."

24. The Board has always recognized that the meaning to be attached to the word "business" depends to a great extent upon the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself comprises the "business".

The business is the “totality of the undertaking”, including: the physical assets, tools and equipment, management and operating personnel, goodwill, and other intangibles. (See *Raymond Cote*, [1968] OLRB Rep. March 1211.) Thus, in determining whether it is the “business” which has been transferred, the Board has frequently found it useful to consider the extent to which these various elements of the predecessor’s business organization have been transferred into the hands of the alleged successor; that is, whether there has been an apparent “continuation of all, or part, of the business - albeit with a change in the nominal owner.” Many of these factors which the Board considers were summarized in *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed):

“In each case the decisive question is whether or not there is a continuation of the business . . . the factors which might assist the Board in its analysis; among other possibilities the presense or absense of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was [sic] before, i.e. whether there has been a continuation of the business.

The issue before the Board, of course, remains whether there has been a “transfer of a business” or “part of a business”; but it is much easier to make that finding, and to conclude that the collective bargaining relationship should be continued, if there is substantial continuity of the other elements of the predecessor’s business organization. If the elements formerly used by “A” to carry on business are now in the hands of “B”, and are used for the same business purposes, it is difficult to resist the conclusion that there has been some form of transfer “of a business” from “A” to “B”. (See also: the remarks of Widgery J. in *Kenmir v. Frizzel et al* [1968] 1 All ER 414 - a case arising out of legislation similar to section 55.)

25. Most of the cases under section 55 involve an alleged sale of a business in its totality. Only a few consider the meaning to be ascribed to the words “part of a business”. Yet those words pose much more difficulty than the term business itself. Almost anything actually traceable to the predecessor could be regarded as “part” of its business, but it cannot have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept this view, would make section 55 the vehicle for extending rather than preserving bargaining rights. Again, the issue must be considered in the factual context of each case and the Board has found a transfer of “part of a business” where one of a chain of retail stores has

been sold to a competitor (*Loblaws Groceries Limited*, [1973] OLRB Rep. Jan. 72; *More Groceries Limited*, *supra*); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Company Limited*, [1970] OLRB Rep. Jan. 1244); where there was a transfer of the oil burner and installation service of a firm which was primarily engaged in the sale and delivery of fuel oil. (*Automatic Fuels Limited*, [1972] OLRB Rep. May 515); and where a slaughter house, which was formerly part of a much larger integrated meat packing company, was transferred to a new owner, (*Beef Terminal* [1980] OLRB Rep. Aug. 1167). In *Central Native Fisherman's Co-Operative et al*, [1977] 1 Can. LRBR 329, the British Columbia Relations Board found that there had been a transfer of a "part of a business" when a cannery which was formerly part of a much larger business organization was sold to a fisherman's co-operative.

26. In *Canac Shock Absorbers* [1973] OLRB Rep. Oct. 508 and in *Alcan Building Products Limited* [1968] OLRB Rep. May 213, the Board dealt with business situations which have a number of similarities to the one presently before us. In *Canac*, the predecessor was engaged in the manufacture of a variety of product lines, most of which were related to the automobile industry. Its operations were divided into a number of departments. One of these was the shock absorber department, which employed approximately twenty per cent of the predecessor's total production personnel. The predecessor's corporate parent decided to liquidate the predecessor's business, and the shock absorber portion of that business was transferred to Canac which, *inter alia*, leased machinery, equipment, tools, and that portion of the premises used by the predecessor (Acme Screw and Gear) to produce shock absorbers. The resulting situation was described by the Board as follows (at paragraph 22):

"Canac is presently engaged in the production of shock absorbers, and to that extent is carrying on part of the business formerly operated by Acme. The operation takes place in the same area of the plant as was used by Acme in the production of shock absorbers. The superintendent of the Acme shock absorbers department, and 11 or so other supervisory staff of the company, occupy similar posts in the new company. Canac is, in effect, the shock absorber department of Acme Incorporated, but otherwise continuing in much the same manner before incorporation."

The Board was satisfied that there had been a sale of "part" of a business.

27. In *Alcan Building Products Limited*, a corporate entity was engaged in the production of aluminium products and carried on business through separate divisions, each of which had its own employee complement and produced a variety of product lines. For economic reasons, a decision was made to discontinue one of these divisions. The successor acquired the premises and some of the equipment used by the predecessor (the rest being disposed of to unrelated purchasers), retained a few of the former employees, and continued to produce two products which had accounted for only a small proportion of the predecessor's total production. The Board nevertheless found a sale of "part of the predecessor's business".

28. In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization managerial or employee skills, plant, equipment, "knowhow" or goodwill, - thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the

terms and conditions of employment, together with the union's right to bargain about them, where preserved. The part of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor's configuration of assets, and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement; and but for section 55, the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied.

29. What then are the facts in the present case? It is obvious that "the business" of Vaunclair Purveyors has not been transferred to Vaunclair Meats if by "the business" one means the totality of its organization or the full range of economic activities which the former company carried out "at its zenith" in 1979-80. Much of that activity, and the equipment to carry it out was transferred to the F. G. Bradley Company - an entirely independent entity which was an active competitor of Vaunclair Purveyors, and which now continues to serve the Cara customers formerly served by Vaunclair Purveyors. Vaunclair Purveyors, as a corporate vehicle, ceased to carry on any of its former business activities, and currently remains essentially a holding company for certain real estate and commercial property assets. On the other hand a definable segment of the business formerly carried out by Vaunclair Purveyors continues to be carried on by Vaunclair Meats from the same location, with many of the same assets, some of the same employees, and on behalf of some of the same principals. Indeed, it is difficult to find very much in the Vaunclair Meats' organization which cannot be traced directly to its predecessor. While Vaunclair Meats was characterized as a "new" business, there is really not very much new about it - other than the new corporate vehicle, and even that is currently carrying on a similar kind of business from the same location under the Vaunclair name. Of course, the "new business" operates on a much smaller scale than Vaunclair Purveyors did; but as the Board found in *Canac Shock Absorbers*, and *Alcan Building Products Limited*, it is implicit in the term "part of a business" that the "part" may be considerably less than the whole. If, in making a section 55 determination, the Board were to give overriding significance to the reduction in the scale of operations, the term "part of a business" could be robbed of all meaning, and virtually written out of the Statute. Likewise, we do not think that we should lightly conclude that there has been a change in the "character" of the business simply because the transferred "part" operates in a new environment, in a somewhat different manner from the way it operated when it was part of the larger organization. This is to be expected of any severed "part", and it would be an unusual entrepreneur who did not initiate any new initiatives, or try to put his own imprint upon his recent acquisition. If a change in circumstances, or scale were sufficient to trigger section 55(5), there would be few sales of "part of a business" which could survive its application, and cases such as *Canac*, *Alcan*, *More Groceteria* and *Automatic Fuels* would have little significance.

30. Our attention was drawn to the alleged incongruity of applying the Vaunclair Purveyor's agreement to Vaunclair Meats, but we do not think the apparent inappropriateness of the collective agreement (which continues as a result of section 55) can be the governing factor in determining whether the business has changed its character. This automatic "flow through" of the predecessor's agreement will always create some transition

benefit or hardship and a successor can as easily inherit a “cheap” agreement as a “rich” one. Indeed, this is one of the factors which should influence the price of the sale transaction. Moreover, every collective agreement negotiated for a “whole” will be more or less appropriate when applied to a part. Job descriptions may need to be modified, and some may be entirely redundant. Grievance procedures may be too simple or too complex. Contractual provisions respecting union stewards or safety committees may not fit well in the new circumstances. If the agreement provides a means for dealing with these issues, it must be followed. If it does not, then the employer can probably act unilaterally. In any event, we do not think it was intended that the Board should dispose of the collective agreement *and* the union’s bargaining rights, simply because there might be problems in implementing a collective agreement.

31. Section 55(5) provides for the termination of bargaining rights only where there has been a *substantial* change in the character of the business occurring within sixty days of the sale. Both the language and the context suggest that this exception to the general rule is intended to be an exceedingly narrow one. The temporal limitation also suggests that section 55(5) should only be applied to exceptional situations in which a person purchases a business organization then turns it into something quite different operating in an entirely unrelated labour and product market (a restaurant into a bowling alley, for example; or a tavern into an emporium for oriental rugs). In those circumstances, the successor is unlikely to have any intention of retaining the predecessor’s employees, and it would make little sense to impose upon a new group of employees doing substantially different jobs, the wages and conditions negotiated with an entirely unrelated predecessor. In *Winco Steak and Burger Restaurant Limited*, [1974] OLRB Rep. Nov. 788, the Board suggested that any change which would make a business “substantially” different from the business of the predecessor, must necessarily involve “a fundamental difference, affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate, or unreasonable in all the circumstances”. We adopt that view.

32. For the reasons we have already given, we do not think we can put much weight on the apparent inappropriateness of the collective agreement (which in any case has now expired), or on the reduction in scale or the changes in internal organization of the business. This is especially so, if one recalls the “pre-Cara” situation, only a few years ago, when Vaunclair Purveyors itself operated at much lower volumes serving these same customers. If there is a “substantial change” in the character of the business of Vaunclair Meats, it must be because the firm is now a “distribution house” rather than a “traditional” purveyor. By purchasing prefabricated meat products, the company has substantially eliminated its need for skilled butchers. As Hurlburt pointed out, some eighty-five per cent of the meat passing through Vaunclair Purveyors had to be “fabricated” while only fifteen per cent of the new company’s business involves fabrication, and this segment involves portioning rather than rough fabrication.

33. There is no doubt that there is a difference in the work/employee requirements between a “distribution house”, and a “traditional” purveyor, but is this difference enough to constitute a “substantial change in character” within the meaning of section 55(5)? Initially, the Board was disposed to accept Mr. Herridge’s most persuasive argument in this regard; however, while the matter is not free from doubt, we do not think the evidence in this case justifies that conclusion. There are simply too many other similarities between Vaunclair

Meats and that part of Vaunclair Purveyors which served the “non-Cara” customers. How can one find the business to be “substantially different” if it is supplying the same product to the same customers with employees actively recruited from the predecessor’s labour force. Of course, those employees now do more general duties; but Wilkinson is primarily a driver, Argyris and Kataris remain portion-butchers, and wrapping and packing functions remain substantially the same whoever does them. There is something to be said for the respondent’s contention, but, on balance, we do not think that there has been a substantial change with character of the business with the meaning of section 55(5). Nor do we see any purpose in holding a representation vote for the results of that vote would not affect our determination of the issue raised in sections 55(1), 55(2), or 55(5).

34. For the foregoing reasons, the Board finds that there has been a “sale” of “part” of the business of Vaunclair Purveyors to Vaunclair Meats, and that the union’s bargaining rights continue in the new entity.

1030-80-M Westmount Hospital, Applicant, v. Ontario Nurses’ Association, Respondent.

Employee – Evidence – Section 95(2) – Prior Board decision finding head nurses to be employees – New job description changing duties and responsibilities – Whether changes sufficient for exclusion in a section 95(2) application – Whether evidence obtained through leading questions in cross-examination at examiner hearing of probative value

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *F. J. W. Bickford and R. G. Halstead for the applicant; J. McCormack and L. Gosselin for the respondent.*

DECISION OF THE BOARD; May 25, 1981

1. This is an application by the employer Hospital pursuant to section 95(2) of *The Labour Relations Act* requesting the Board to determine the status of its Head Nurses. A previous examination by the Board, at the time of the Registered Nurses’ initial certification, determined that the Head Nurses were “employees” within the meaning of the Act (Board File No. 0974-75-R, released February 3, 1976). The Hospital takes the position that the duties and responsibilities of the Head Nurses have changed to a sufficient extent to make the Board’s prior determination no longer applicable.

2. Since the time of the Board’s prior determination, the Head Nurses have of course been treated as members of the nurses’ bargaining unit and covered by the collective agreement pertaining thereto. As the Board pointed out in *Sudbury and District Health Unit*, (Board File No. 2055-79-M, unreported decision released March 11, 1981), at paragraph 5, “an employer’s organizational scheme has a historical dimension which must be considered

when the evidence is being weighed”, and accordingly, “a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position”. In the present case the applicant is also faced, as noted, with a problem of *res judicata*, and the changes upon which it seeks to rely must be significant.

3. The evolution of this employer’s organizational structure does, however, provide an explanation for the bringing of the present application. Immediately adjacent to the Westmount Hospital is the Walter P. Hogarth Memorial Hospital, for whose nurses the respondent was also certified as bargaining agent in 1976. The Head Nurses at Hogarth apparently performed functions somewhat different from those at Westmount, and were excluded from the bargaining unit by agreement of the parties. The relationship between Hogarth and Westmount is not clear, particularly from the Officer’s report (which is meant to be the source of all evidence from the parties). It would appear, however, that the two hospitals had always shared a common administrator, but were otherwise operated separately, through separate Boards of Directors. In April of 1980, the two hospitals amalgamated, and a single system of administration was adopted. One of the changes which the employer sought to implement was to bring the job functions of the Head Nurses at Westmount into line with those at Hogarth, so that all Head Nurses could be treated on a similar basis. Indeed, since the amalgamation, the Head Nurses at Westmount have begun meeting with the Head Nurses at Hogarth, together with more senior staff, on a weekly basis. In addition, some five or six meetings were held with the Head Nurses, over a period of two months, for the purpose of obtaining from them input into the form which their revised job descriptions would take. That study has now been completed and the new job description implemented.

4. The Board has no difficulty understanding the preference of the employer that all of its Head Nurses now be treated on the same basis (see *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. April 261 at paragraph 18, and *Delta’s Inn of the Provinces*, Board File No. 2191-79-M, October 27, 1980 (unreported), at paragraph 9). The Board does not, however, have the duties of the Hogarth Head Nurses before it, and accordingly, can derive no guidance whatever from their agreed-upon exclusion. The present application must be assessed on the basis of the examination conducted of the changes in duties and responsibilities of the Head Nurses at Westmount. In this regard, one further point should be noted. From a reading of the examination transcript it quickly became evident that the witness herself was of the view that she was a member of management. There is nothing improper in a witness’ own perception of how she has been treated by her employer, through her experiences, can be one of the factors that the Board will consider in weighing the evidence. The problem in this case, however, was that counsel for the applicant employer, in his portion of the examination, proceeded to put to the witness at great length questions in an unmistakably leading manner, so that the Board finds itself in difficulty discerning precisely whose evidence was in fact being received. Notwithstanding the fact that this took place in “cross” examination, in a technical sense, the Board accordingly finds that that portion of the examination is of very limited probative value or assistance to it.

5. Counsel for the respondent sought to go further and impugn the credibility of the witness, Mrs. Gray, on the question of “changes” by reference to the 1976 transcript before the Board. The Board noted, however, that the evidence which the transcript represents becomes merged in the actual findings of fact which the Board sets out in its decisions, so that the transcript cannot be used to establish facts which are inconsistent with the findings of fact

contained in the Board's decision. The Board notes as well that the Head Nurse examined on the earlier occasion was not Mrs. Gray (although Mrs. Gray was one of the Head Nurses represented and bound by the witness' testimony), and, as a matter of credibility, individual perceptions and experiences can vary to some degree. On the basis of all the material before it, including the prior transcript, the Board does not find the evidence of Mrs. Gray to be unworthy of belief. The Board has, however, taken into account those areas of the evidence which appear to be entirely subjective in nature, and concentrated its attention on the specific areas of authority which the transcript discloses. The Board has, in addition, its earlier decision as a reliable guide to the Head Nurses' authority as it previously existed.

6. The Board on the evidence must conclude that significant material changes have in fact occurred in the duties and responsibilities of the Head Nurses at Westmount, so as to make their inclusion in the bargaining unit no longer appropriate. In the earlier decision, as in the *Sudbury and District Hospital* case, *supra*, it was obvious that no meaningful managerial authority had yet become focussed at the level of Head Nurse (or its equivalent). The mere scheduling and assigning of work, a responsibility of Head Nurses even at the time of the earlier examination, has historically been recognized as a typical "group leader", rather than "managerial", function. Beyond this, the Head Nurses at Westmount carried out very little significant action affecting the conditions of employment of their staff without some form of consultation with their superiors, and this is reflected in the earlier transcript and Board decision. It was clear that effective decision-making was centred above the rank of Head Nurse.

7. That has now been substantially altered. The Head Nurse now can clearly grant time off, without conferring with anyone, for a period of three days or less. Overtime for staff to complete assignments may also be required without consultation, and it is now the Head Nurse whose signature is required on the pay authorization, unless she is absent. In fact, all monitoring of attendance is now in the hands of the Head Nurse. The time-clocks in use for members of the bargaining unit at the time of the earlier decision have been dispensed with, and it is the Head Nurse alone who is responsible for maintaining the full attendance record, which she then admits directly to Payroll rather than through the Director of Nursing. The Head Nurse now has an office of her own, away from the nursing station, and spends substantially less time than she did previously in direct patient care. While evaluations of staff were performed from time to time in the past, these have now been regularized, and have been demonstrated to form at the very least the basis on which probationary employees are retained or not, or continued on further probation. In addition, the Head Nurse is now, at least nominally, the first step in the grievance procedure.

8. The meetings which the Head Nurse now attends appear to differ significantly from those considered by the Board in 1976. The weekly meetings already alluded to discuss matters which regularly include staffing or disciplinary problems. These are confidential matters of the type which can raise a conflict of interest. There are now, in addition, meetings at the conclusion of negotiations, and from time to time, to review the terms of the collective agreement and discuss management's interpretation. While this involvement, as well as a nominal role on behalf of the employer in the grievance procedure, is, as the *Hydro Electric Commission for the Borough of Etobicoke* case, [1981] OLRB Rep. Jan. 38 points out, insufficient on its own to establish the kind of effective control necessary to signify a "managerial" person, such circumstances do at least provide some insight as to how the individuals are being perceived and treated by either party. They represent, in effect, at least

some of the “trappings” of management. The present case goes further, as well, as the Head Nurses are also now made party to meetings leading up to negotiations at which current bargaining developments amongst hospitals are discussed and commented upon, and input for changes is solicited.

9. On the subject of hiring, firing and discipline, the new job description provides that the Head Nurse is: “responsible for the appointment, transfer, promotion, demotion, discharge or discipline on all nursing personnel assigned to [her] unit”. Mrs. Gray testified that she has hired one registered nurse and two nurses’ aides since the new job description came into effect in June of 1980. In all three cases the applicants were first screened by the nursing office, and then hired if Mrs. Gray, following an interview with them, gave her approval. Mrs. Gray testified that she has not yet had occasion to suspend or discharge anyone. As the Board noted again in *Sudbury and District Health Unit, supra*, at paragraph 5: “It is not sufficient that an individual has ‘paper powers’ contained in a job description, or a ‘managerial’ job title, if managerial functions are not actually exercised”. That comment, however, was not meant to suggest that every power enumerated in a job description must be exercised before the Board will believe it exists. As here, for example, an individual need not first go out and fire one of her fellow members before the Board will find she has been given that authority, and is accordingly now a member of management. Rather, the Board was indicating that an employer cannot rely on a status or change in status contained only on paper, when that paper-statement is inconsistent with the kind of authority that the individual is generally being allowed to exercise in practice. In the *Sudbury and District* case, for example, the “new” management structure had not yet been implemented, or even fully discussed with the participants, and the powers relied upon, on all of the evidence, could not be found to exist. In the present case, the changes in authority have clearly been communicated to the Head Nurses and implemented, and that authority has at this point been exercised in a sufficient number of areas to demonstrate to the Board that a real delegation has in fact taken place.

10. On the basis of the evidence before it, the Board in this case finds that the duties and responsibilities of the Head Nurses at Westmount Hospital have changed to such an extent that the Board’s prior determination is no longer applicable. The Board further finds that the Head Nurses are not “employees” within the meaning of *The Labour Relations Act*, by virtue of the exclusionary provisions of section 1(3)(b) of the Act.

2703-80-U Ontario Nurses' Association, Complainant, v. Women's College Hospital, Respondent.

Change in Working Conditions—Practice and Procedure—Section 79—Work schedules changed during statutory freeze period—Collective agreement giving management right to schedule work—Whether breach of Act—Whether Board ruling upon anticipatory breach

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *Judith McCormack, Felicity Briggs and Jane Billingham for the complainant; C. G. Riggs, Dr. A. H. Qizilbash and B. Buston for the respondent.*

DECISION OF G. GAIL BRENT, VICE-CHAIRMAN, AND BOARD MEMBER C. G. BOURNE; May 14, 1981

1. The complainant has complained that the respondent has acted contrary to section 70 of *The Labour Relations Act* and section 10 of *The Hospital Labour Disputes Arbitration Act* in that by memo dated February 25, 1981 it set out plans for re-organizing its intravenous and outpatient blood collection services.

2. The parties are parties to a collective agreement which expired on September 30, 1980. They are agreed that notice of its desire to bargain concerning both central and local issues was properly served by the complainant on the respondent; that “no board” reports were issued in connection with both sets of negotiations; that no new collective agreement has been entered into; and that they are proceeding to interest arbitration pursuant to *The Hospital Labour Disputes Arbitration Act*. In short, they both agree that this is a situation which has arisen during the statutory freeze period.

3. The respondent has not yet implemented its planned re-organization and when the parties were questioned concerning the Board's jurisdiction under the circumstances, they agreed that the Board should treat the matter as if the changes had been implemented. The Board does not give advisory opinions, nor does it have jurisdiction to grant anticipatory relief; however, in a situation such as this where the parties have agreed to treat the matter as though it were in effect and where the respondent has indicated that the changes have been postponed as a matter of courtesy, it seems foolish, from a labour relations point of view, to refuse to make a determination of the issue.

4. The facts are reasonably straightforward. The five full-time nurses affected all work on the intravenous team under the direction of the Director of Laboratories, Dr. Qizilbash. All the nurses were hired to work on the day shift (7:30 a.m. to 3:30 p.m.) and they do not rotate shifts, although they do work weekends on a rotating basis. The nurses on this team are required to circulate throughout the hospital and wear “pagers” or “beepers” to summon them. Since the team was established in 1965, it has been operating one shift seven days a week.

5. The nurse who testified, Ms. Mulgrew, explained that the workload of the team has increased and that the respondent also explained to the team members that it wanted to extend the coverage of the team. The information about the changes was conveyed in two meetings

which preceded the announcement which was sent to all the nurses concerned by means of the internal mail system. The details of the changes as contained in the memo are set out below:

Please be advised that the re-organization of the intravenous and outpatient blood collection services, will increase the nursing establishment by 2.5 to a total of 8 R.N's. These changes will create a position of Head Nurse from amongst the eight R.N. positions. The Head Nurse responsibilities, in addition to the routine workload, will consist of the supervision of the daily workload, organizing and assigning the tasks on a weekly or a monthly basis.

This reorganization will result in amalgamation of blood collection and intravenous service for both in and out patients.

The above re-organization will require alterations to be made in the work schedule for the present staff in order that such staff and staff to be hired rotate approximately to two shifts between the hours of 0730 and 2300 hours on a 7 day per week basis. Revised schedules indicating the new staff patterns will be established by the new head nurse once in place and approved by the Laboratory management. Until that time the laboratory management will schedule staff.

The above re-organization will necessitate the following changes:

1. The responsibilities of initiating and changing blood transfusions during the specified hours.
2. Intramuscular injection of Rh immune globulin therapy and
3. Other changes as deemed necessary.

The appropriate training programme will be set up and training will be carried out prior to commencement of the new programme. The anticipated changes set out above are expected to take place on or about April 1st, 1981.

Permanent nursing staff in Emergency, I.C.U. and Delivery Suite will be suitably trained in the transfusion techniques. They will be responsible for changing blood and/or blood products after 2300 hours. On all the other wards, the nursing supervisor will be responsible for changing the blood after 2300 hours. The resident staff will continue to be responsible for I.V. initiation daily between the hours of 2300 - 0730 hours.

The current I.V. nursing staff is encouraged to discuss details of these staff changes with their appropriate supervisor, in order that they may understand fully their responsibilities and the hospital's need to carry out this service.

Should any of the above require further clarification, I shall be happy to be of help.

“Ali H. Qizilbash”

Ms. Mulgrew stated that the only change with which the team took issue was the requirement that nurses rotate between the two shifts rather than work straight days as before.

6. Dr. Qizilbash testified that in the summer of 1980 the respondent received the report of an accreditation committee which said that the respondent should change its practice of requiring interns and residents to start blood transfusions and initiate intravenous on the afternoon shifts. Apparently the residents and interns had complained to the committee that they were being taken from other duties and training in order to perform tasks. The committee informed the respondent that something would have to be done before the next review in 1981. Dr. Qizilbash said that then he became Director of Laboratories in September 1980, the problem was turned over to him. No action had been taken before then because of the prospective change in directors. He said that the studies which were done about the workload indicated that the workload of the present team was increasing and would increase even more with the additional duties. He said that he concluded that if the interns and residents were not to perform the work as before, more nurses would be required and the respondent would have to institute an afternoon shift to allow it to extend coverage during the times of greatest demand. He also said that he rejected the idea of a permanent afternoon shift because he considered it to be more efficient to have all of the nurses familiar with all of the work done by the team at all hours and to maintain the team as a cohesive unit. He said that more people would need to be hired to allow for replacements if two permanent shifts were instituted. He denied that the respondent was simply changing its procedures as a result of the strike of interns and residents which took place in the autumn of 1980.

7. The collective agreement provides, in part, for the following in its management rights clause:

**ARTICLE 6 - RESERVATION AND CONTINUATION OF
MANAGEMENT FUNCTIONS**

6.01 The Association recognizes that the management of the Hospital and the direction of working forces are fixed exclusively in the Hospital and shall remain solely with the Hospital except as specifically limited by the provisions of this Agreement, and without restricting the generality of the foregoing the Association acknowledges that it is the exclusive function of the Hospital to:

- ...
- (c) determine in the interest of efficient operation and highest standard of service job rating or classification, the hours of work, work assignments, methods of doing the work and the working establishment for the service;
- (d) determine the number of personnel required, the services to be performed and the methods, procedures and equipment in connection therewith.

6.02 These rights shall not be exercised in a manner inconsistent with the provisions of this Agreement.

8. Article 8 of the collective agreement deals with hours of work. It does not specify the times when shifts must begin and end nor does it specifically limit the respondent's right to require any nurses to rotate among shifts. Article 8.08 sets out twelve "Scheduling Objectives" none of which are relevant to the situation before the Board; however, the introductory words to the list of objectives is of interest and is set out below:

8.08 *Scheduling Objectives*

The Hospital will endeavor to maintain and achieve the following objectives in the formulation of working schedules, although it is recognized by the Association that it has not always been and may not always be possible to attain these objectives:

...

9. The Board was referred to several cases dealing with the statutory freeze period and its ramifications. The cases cited were *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. July 1147; *Molson's Brewery (Ontario) Limited, Toronto*, [1977] OLRB Rep. Aug. 526; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795; *Scarborough Centenary Hospital Association*, [1978] OLRB Rep. Oct. 949; and *Scarborough Centenary Hospital Association*, [1979] OLRB Rep. June 568. All of the cases stated that the purpose of the statutory freeze was to preserve the status quo during the sensitive period while negotiations are going on. As the Board pointed out in the last case cited above, at paragraph 8, an express right set out in the collective agreement forms part of the collective bargaining status quo which must be maintained. In the *Molson's* case (*supra*), the Board also noted that where there was an express right in the collective agreement giving management the exclusive function to determine work schedules, the exercise of that right during the freeze period was not a violation of section 70. Accordingly, it would be wrong to conclude that management is precluded from making changes of any sort during the freeze period because the Board has held that, at the very least, it can continue to exercise its specific rights under the collective agreement.

10. In the case at hand, Article 6.01(c) and (d) specifically recognize the right of the respondent to determine "the hours of work, work assignments . . . the working establishment for the service . . . the number of personnel required", etc. Article 8 does not in any way limit the right to establish a second shift where none existed before or to require nurses who worked straight days to rotate shifts. Article 8.08 begins with a specific recognition that the respondent has the right to establish "working schedules" and that in so doing, it will attempt to meet certain objectives. There is no allegation that any of the objectives would not be met if the procedures outlined in the memo were instituted.

11. This case appears to fall within the four corners of the *Molson's* decision (*supra*). There is an express right to do something in the collective agreement and that right may be exercised in the freeze period to the same extent that it could be exercised before the freeze set in. The fact that in relation to this particular group there has been no change in schedules for several years is really not the issue, just as it was not in *Molson's* (*supra*).

12. In this case it should be stated for the record that there is no allegation of bad faith on the part of the respondent and that the changes appear to be motivated solely by operational considerations which arose following the report of an accreditation committee in the summer of 1980. The respondent has the right to respond to such operational requirements by invoking specific rights vested in it by the collective agreement between the parties.

13. For all of the above reasons, the complaint is dismissed.

2455-79-R Canadian Union of Educational Workers, Applicant, v. York University, Respondent.

Certification – Employee – No relation between remuneration and work performed by graduate and research assistants – Selection mainly based on financial need – Whether ‘employees’ within meaning of Act

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members C. G. Bourne and O. Hodges.

APPEARANCES: *E. Shilton Lennon for the applicant; D. Hersey for the respondent.*

DECISION OF RORY F. EGAN, VICE-CHAIRMAN, AND BOARD MEMBER C. G. BOURNE; May 12, 1981

1. This is an application for certification in which the applicant seeks certification as bargaining agent for all part-time employees enrolled as graduate assistants and research assistants paid from operating funds of the respondent. For the purposes of this decision, the term “graduate assistants” is used to cover both types of assistants.

2. The applicant, under another name, applied for certification of a bargaining unit which included graduate assistants in 1975. In a decision dated September 16, 1975, the Board found that graduate assistants at York University did not qualify as employees within the meaning of *The Labour Relations Act* (*York University*, [1975] OLRB Rep. Sept. 683).

3. The respondent argued that there had been no material change in the status of graduate assistants since 1975 and that *res judicata* applied.

4. It was submitted by the applicant that a substantial change had occurred in the relationship between the University and the graduate assistants and that, furthermore, the law or interpretation thereof with respect to graduate assistants had changed, having regard to the decision of the Board in the *Carleton University* case, [1978] OLRB Feb. 179. The bargaining unit found by the Board to be appropriate in the *Carleton* case was:

All employees of the respondent in Ottawa employed as teaching assistants, demonstrators, part-time or sessional lecturers, markers, research assistants or associates, and service assistants, who are graduate

students enrolled in the Faculty of Graduate Studies or undergraduate students at Carleton University, excluding employees covered by collective agreements with Canadian Guards' Association, Local 103; C.U.P.E., Local 910; I.U.O.E., Local 796; Graphic Arts International Union, Local 224, the Carleton University Support Staff Association and the Carleton University Academic Staff Association.

Teaching Assistants at York are already represented by the applicant by virtue of the 1975 decision.

5. The applicant was unable to produce witnesses who knew of the arrangements under which the graduate assistantships were awarded in 1975. The Board ruled that if the applicant could establish that the present graduate assistants could be shown to be employees within the meaning of *The Labour Relations Act*, it would accept that as proof that a change must have occurred since 1975. On that basis the matter was allowed to proceed.

6. It was the position of the respondent that the status of graduate assistants and the university's manner of dealing with them had remained virtually unchanged since 1975 except for the fact that the university had become more flexible about the detailed distribution of the available funds. That position was supported by the evidence.

7. In view of the fact that the applicant placed a great deal of emphasis on what it perceived to be a change in the viewpoint of the Board with respect to graduate assistants since the 1975 decision, we propose to examine that award together with the criteria used in the *Carleton* award and the evidence adduced in this application.

8. In the *Carleton* case the Board found that that university was in large measure dependent upon the performance of a wide variety of academic tasks by students who are paid for that purpose and selected on the basis of academic merit.

9. The evidence called by the applicant here is that no such dependency on the performance of the tasks exists. The testimony given by Professor Ellis of the Faculty of Environmental Studies and Chairman of the Awards Committee who was called by the applicant, indicated that 85% of the jobs assigned to graduate assistants could be dispensed with without affecting the operation of the university. Professor Ellis explained that the reason any task at all was assigned was to justify to the government the handing out of money. Professor Ellis also testified that if 70 graduates applied for 50 tasks, then it would become necessary to "drum up" additional tasks.

10. The evidence in the present case (again given by the applicant's witness) is that the primary criterion for an award is the financial need of the student. A secondary criterion, if that is the correct word, was the need felt by the university to offer awards to prospective graduate students with outstanding academic records, in order not to perform any task as a graduate student assistant, but to lend prestige to the graduate school with the task being a secondary matter to justify the enticement.

11. The *Carleton* decision found that the graduates which it found to be employees were remunerated for their work and the quantity of their remuneration relates to the amount of work they do and to their academic qualifications. The evidence in the present case is that

there is little relationship between what a student is asked to do and the amount of the award allocated to that student. The evidence is that, in the Humanities at least, many students continue to receive payment although they have nothing to do because so many are assigned similar tasks.

12. Taken into account in reaching its determination in the *Carleton* case was the fact that deductions were made for income tax, unemployment insurance and Canada Pension Plan from the money paid to the graduate students dealt with in that award. In the Appointment Form used at York with respect to Teaching Assistants as well as Graduate Assistants and Research Assistants is the following paragraph:

*GRADUATE ASSISTANTS AND
GRADUATE RESEARCH ASSISTANTS:*

The amount of money stated above is not classified as employment income; therefore no deductions are made at source for Income Tax, Unemployment Insurance or Canada Pension Plan contributions, and no additional amount is payable as Vacation Pay. *The Grant in Aid is classified in the same way as Graduate Assistantship.* It is understood that the above amount includes all consideration for Vacation Pay.

13. It is obvious from the foregoing that the University and the Graduate Assistant who sign the appointment form have no intention of establishing an employer-employee relationship.

14. It was also in evidence that applicants for entrance into the School of Graduate Studies were offered graduate assistantships at a named sum with the proviso that some task would be assigned to them at a later date.

15. Before leaving the *Carleton* case, it should be observed that that decision distinguishes its facts from those underlying the *York* decision, (supra).

16. It is clear that the facts upon which the *Carleton* decision is based render the decision of little or no avail to the applicant and lends no support to the contention that the "law" or anything else in the Board's approach to matters such as those raised in this and the prior *York* case has changed.

17. There are approximately 300 graduate and research assistants involved in the application. The applicant called nine witnesses who had recently held graduate assistantships. They were not, of course, able to give any testimony with respect to 1975 and the only evidence we have with respect to that comes from the university as we have already intimated.

18. There is no doubt that these witnesses in varying degrees and for varying amounts provided work or performed tasks assigned to them which were of value to the university. No attempt was made at all by the university to disparage the work of these witnesses. There was, however, no evidence to indicate that the work was imperative or as to the relationship between the assignments and the money paid.

19. In support of their evidence, reference was made to the university calendar which

advises graduates of the possibility of obtaining an assistantship for which a "stipend" will be paid to those appointed. It was also in evidence that the tasks for which money would be allocated were made up by the faculty and posted on a board so that students might see what was available and consult with the professors involved. This is the closest the evidence comes to a "predetermination" of work to be done. It is, however, quite clear that it is not work upon the accomplishment of which the university is dependent. In one instance at least, the work for which a grant was made was outside the faculty of the professor director. The posting appears to add some formality to the scheme even though the tasks are devised as a means of dispensing money, according to the university, which would otherwise not be available to the graduates or to anyone else. The hours involved and amount available would be shown on bulletin boards but, according to Professor Ellis, it might be that the professor concerned would indicate to a student that the hours shown on the posting might not all be required but that, nevertheless, the full amount of money shown in the posting would be paid. If the duties have been decided upon, the fact is entered on the appointment form; if not assigned, that too is indicated. That is to say, the stipend is fixed before a task is assigned.

20. The graduate assistantship programme, as the evidence makes plain, does not arise out of dependency on the part of the university on anyone for the carrying on of its functions. It is therefore basically not a matter of recruiting graduates to assist the university but, rather, a scheme devised to finance needy students in order to attract them to, and help them during their studies at the graduate school. It is very clear that the staff is required to think up tasks that could be used to justify the payment of money to students in need and those whom the university wants to attract. The university does not have scholarship funds with which to attract students and uses the graduate assistants programme as the best substitute available. The fact is that the university is basically not offering jobs; it is offering money to help students and because of the legalities involved, offers the student an opportunity to fulfill a task in order to justify the money grant.

21. In our opinion we find, without denegrating in any way the work of the students, that the graduate assistants are not employees within the meaning of *The Labour Relations Act*. We would add that, on the evidence, nothing has changed materially since the 1975 decision of the Board. The application is accordingly dismissed.

22. Mr. Hodges' decision will follow.

2672-80-R; 2744-80-U; 2814-80-U; 0129-81-U; 0130-81-U Food and Service Workers of Canada (formerly Canadian Food and Associated Services Union), Applicant/Complainant, v. **Zum Rudy's Foods Limited**, Respondent, v. Group of Employees, Objectors.

Discharge for Union Activity – Practice and Procedure – Section 7a – Parties reaching settlement agreeing that conditions precedent for section 7a present – Whether Board relying solely on settlement to certify without vote – Whether Board requiring evidence

BEFORE: E. N. Davis, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *M. Cornish and W. Iler for the applicant/complainant; R. C. Schubert and T. Nella for the respondent; Ms. Deborah Harris for the objectors.*

DECISION OF THE BOARD; May 11, 1981

1. This is an application for certification in which the applicant requests the Board to exercise its discretion pursuant to section 7a of the Act and to certify the applicant. Consolidated with this application are a number of complaints filed under section 79 of the Act.

2. The Board in its decision of May 5, 1981, found the applicant to have status as a trade union within the meaning of section 1(1)(n) of the Act.

3. On agreement of the parties, the Board determines that all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff, musicians, and chefs exercising managerial functions, constitute a unit appropriate for collective bargaining.

4. The parties were in agreement, and the Board finds that there were 46 employees within the bargaining unit on the date of application. The applicant filed documentary evidence of membership in respect to 19 employees in the said bargaining unit as of April 6, 1981, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act. Thus, the applicant has demonstrated membership support equal to 41.3% of the employees in the bargaining unit.

5. The Board has filed with it a petition signed by 31 persons, 4 of whom were persons who were also claimed by the applicant to be members. The Board determined it not to be necessary to inquire into the origination and circulation of such document in view of the level of membership support demonstrated by the applicant.

6. The applicant adduced evidence in support of its application under section 7a of the Act. The respondent elected to call no evidence and joined with the applicant in making representations to the Board that the evidence adduced would justify a finding that the respondent had contravened the Act, in such a way, that the true wishes of the employees are not likely to be ascertained through a representation vote and, further conceded that the

applicant had made a show of membership support adequate for the purpose of collective bargaining. No one appeared on behalf of the group of objectors at the continuation of the hearing at which these representations were made.

Section 7a of the Act provides:

“7a. Where an employer or employers’ organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers’ organization are not likely to be ascertained, and , in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

7. On February 10, 1981, Susan Ballantyne, a part-time waitress, discussed with Barbara Ades, a full-time waitress, the possibility of forming a union and concluded they should go forward with the project. Ballantyne undertook to contact a union representative and one or two other employees. This discussion took place at the restaurant bar and Lubo, the Assistant Manager, was also seated at the bar four to five stools away. Lubo said he did not want to hear about it but thought it was a good idea. As a result, on February 12, 1981 a meeting was held in Murray’s Coffee Shop with Wendy Iler, a full-time union representative, Ades, Noreen House and Shirley Leviton. All employees then present signed union cards and decided to talk to other employees to see if they were interested.

8. Ballantyne signed up four other employees prior to March 2nd when she was discharged and signed up one other employee, Tammy Wright, on March 2nd, subsequent to her discharge. Ades, who was discharged March 3rd had by then approached some eight employees regarding joining the union, five of whom did join. Wright was discharged on March 5th.

9. Tim House, a brother of Noreen House, was employed part-time as a bartender and waiter and was told by Noreen House that she, Tammy Wright, Shirley Leviton, Barbara Ades, Tony Paccione and Dorothy Vreeka had all been fired because of union membership. Tim House’s first day of work the week of March 2nd, was on March 5th and on reporting to work met Tar Nella, the proprietor. House asked Nella if he still worked there because he had heard a lot of people had been fired. Nella asked him “are you desirable” to which House replied “I think so” and Nella said “Okay”. Later that night when House was working behind the bar, Nella came up to him and said “I think we have to fire them all” to which House said, “Well, is that right?”. Nella then said, “Pedro (a waiter) looks awfully guilty” and walked away.

10. A section 79 complaint was filed on behalf of the discharged employees and a written settlement without prejudice agreed upon before a Labour Relations Officer. All employees received compensation for lost wages and were returned to work on March 14th. One employee, Dorothy Vreeka did not return to work.

11. On March 7th, prior to the settlement having been reached, a meeting was held by

the union in order to talk to people and to let them know what was going on and to offer reassurances. Iler and Ballantyne explained how the certification process worked. Ballantyne spoke with two employees who had not been fired and asked them if they could get more members or ask friends if they were interested.

12. The evidence is clear that the sole motivation giving rise to the discharges of Wright, Ballantyne and Ades were their participation in union activities. This was in contravention of sections 56 and 58 of the Act, and the Board so finds.

13. Tammy Wright, who signed a union card for Susan Ballantyne shortly after Ballantyne's discharge, was called into the office forty-five minutes later by Lubo, the Assistant Manager, who stated that Ballantyne was asking people to sign funny little cards and asking for a dollar and that was a bad thing. Wright stated she had already signed and Lubo said, "that's too bad. They just want more and to cause trouble for everyone". Wright offered a rationale for her own decision and stated she did not think she should be fired. Lubo stated he didn't think she should be fired but that "Nella won't like it". Three days later when Wright came in to pick up her pay cheque she was called to the office by Nella and asked if she could work every day the following week. (Wright states that she knew no reason to justify this request and that Nella was aware that she had constraints on her availability). When Wright stated she couldn't work every day and Nella told her "Well, if you can't you're fired". Wright endeavoured to outline her rationale for joining the union and evoked comments from Nella that "But you helped Susan and not me and that's what matters" and "that's all well and good, but you did sign and that's what matters". Wright stated that somewhere in the discussion Nella said, "Susan is organizing the union for herself and not for you".

14. At 8:30 p.m. March 1st, Susan Ballantyne phoned Lubo to ascertain next week's schedule. Lubo asked her if she could work Saturday, March 7th in addition to her usual Monday and Tuesday. Ballantyne was reluctant to agree. Lubo stated he was short-staffed for the week and really needed her help and Ballantyne agreed. Ballantyne reported the next night at 5:30 p.m. and was met by Lubo who stated she had to be laid off as he had too many waitresses. While Ballantyne was arguing the complete change from the preceding night's phone conversation, Nella came along and told her she was laid off and told Lubo, "to get back to work". On Thursday, March 5th, Ballantyne came into the restaurant to pick up her cheque and was told by the cashier that the cheques were in Nella's office. While Ballantyne was following Nella upstairs to the office, Nella said, "if I ever see you in here again I'll physically throw you out". When Ballantyne said, "that's a threat", Nella responded, "Yeah, so call the cops". Nella went into his office while Ballantyne stood in the doorway and Ballantyne states Nella swore at her several times and referred to her as "you ugly f...ing bitch". The conversation terminated when Nella handed her her cheque and said, "get out".

15. Barbara Ades, who had overheard the conversation of March 2nd between Lubo and Ballantyne, sat down with Ballantyne immediately afterwards and had a drink with her and speculated as to what had provoked the action. They concluded that probably their union activity had been discovered (as in fact is apparent from Wright's evidence relating to her conversation with Lubo on March 2nd) and Ballantyne stated her intention to file a section 79 complaint. Ades states that during this conversation Nella was on a balcony above where they were sitting and from time to time would walk up to the railing and peer over at them. The following day, March 3rd, Ades received a call from Nella who asked if she could work any time that week. Ades had some two weeks before arranged with Lubo not to work from

Wednesday through Monday of that week and had re-confirmed this on February 28/ March 1st. Ades explained to Nella that she had planned to take the time off and that in the past employees had been so permitted with proper notice. Nella stated, "there'll be no more of that around here" and that "I am afraid I'll have to let you go. I need someone to work this week". Ades stated that she spoke to no employees until March 9th at which point she discovered eight people had been fired.

16. The employees were reinstated in employment pursuant to the terms of settlement. Insofar as Ballantyne, Ades and Wright are concerned the evidence is that upon their return to work they were subjected to much closer and detailed supervision than had existed previously, were given job assignments which were considered by employees to be less preferable than they previously had, had certain previous privileges cancelled such as free lunch to day workers, 30% discount on meals, free drink after work, were, in some cases, restricted to work stations and precluded from employee contacts during work hours and required to do own bus-boy work etc. The evidence justifies a conclusion that, while the agreed upon reinstatement was implemented, the respondent continued to exhibit in obvious ways his displeasure with respect to these employees, in such a way, as it could only be a clear signal to all employees that employee participation in the lawful activities of the trade union were inimical to the employer-employee relationship.

17. It is well established that the Board views section 7a as:

"...an extraordinary procedure which is not applied by the Board in response to all employer violations of the Act during the course of a union's organizing campaign. The Board is empowered to act under section 7a of the Act only when satisfied that the employer has contravened the Act so that the true wishes of the employees are not likely to be ascertained by the taking of a secret ballot..." (See the *G. T. Couriers* (416656 Ontario Ltd.) case [1979] OLRB Dec. 1167 at 1170.)"

18. In the instant case the contraventions of the Act in the discharge of Ballantyne and Ades (the two initiators and leaders of the organizing campaign) accompanied in time by the discharge of six other employees would, in our view, most emphatically make the point to all employees that there was a direct connection between union membership and job security. Further, the continued program of the respondent, following the reinstatement of these employees, would be viewed by employees as a clear demonstration that the exercise of their rights to join and participate in the lawful activities of the applicant would attract retaliation by the respondent. In such circumstances, and because of the wide spread and continuing chilling effect of the respondent's activities, the Board is of the opinion and so finds that the true wishes of the respondent's employees are not likely to be ascertained in a representation vote. The Board further finds that the applicant has demonstrated membership support adequate for purposes of collective bargaining.

19. The Board, therefore, exercises its discretion under 7a of the Act and certifies the applicant as the bargaining agent of the employees in the bargaining unit determined in paragraph 3 above.

20. In respect to the section 79 complaints respecting Board Files 2814-80-U, 2744-80-U, 0129-81-U and 0130-80-U, the complainant, pursuant to the terms of a written settlement, requested permission to withdraw such complaints. The Board grants such permission and the proceedings in respect to those files are accordingly terminated.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1981

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0619-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. McConnell, Maughan Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto save and except draftsmen, party chiefs, those above the rank of party chiefs, sales, office, and clerical staff, and students employed during the school vacation period". (12 employees in unit). (*Having regard to the agreement of the parties*).

0814-80-R: United Brotherhood of Carpenters & Joiners of America, Local 2486, (Applicant) v. Kaymic Developments (Ontario) Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors within a radius of thirty-five miles from the City of Sudbury Federal Building, same and except non-working foremen and persons above the rank of non-working foreman". (12 employees in unit).

1121-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Seeley & Arnill Construction Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all construction labourers and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the maintaining and repairing of same in the District of Manitoulin excepting therefrom those portions of the District of Manitoulin which are included in the area encompassed by a thirty-five mile radius from the Sudbury Federal Building, and excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (16 employees in unit).

1265-80-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of Schreiber, (Respondent).

Unit: "all employees of the respondent in the Township of Schreiber, save and except the clerk treasurer, assistant clerk treasurer, recreation co-ordinator, road superintendent, town engineer, foremen and those above the rank of foreman, and those regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (14 employees in unit). (*Clarity Note*).

1453-80-R: Ontario Nurses' Association, (Applicant) v. Tillsonburg District Memorial Hospital, (Respondent).

Unit #1: "All registered and graduate nurses employed in a nursing capacity by the respondent in Tillsonburg, save and except nursing co-ordinators, persons above the rank of nursing co-ordinator, employee health/infection control nurse, quality assurance nurse, and persons regularly employed for not more than twenty-four (24) hours per week." (49 employees in unit).

Unit #2: "All registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week by the respondent in a nursing capacity in Tillsonburg, save and except nursing co-

ordinators, persons above the rank of nursing co-ordinator, employee health/infection control nurse, and quality assurance nurse". (41 employees in unit).

1712-80-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, (Applicant) v. Elastometal-Aquatite Limited, (Respondent).

Unit: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all reinforcing rodmen in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

2341-80-R: Toronto Typographical Union, No. 91 (ITU), (Applicant) v. Ontario Banknote Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (121 employees in unit). (*Having regard to the agreement of the parties*).

2383-80-R: Energy and Chemical Workers Union, (Applicant) v. Ottawa Fibre Industries Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Ottawa, Ontario, save and except supervisors and shift leaders and persons above the rank of supervisor and shift leader, office staff, sales staff and laboratory employees". (47 employees in unit). (*Having regard to the agreement of the parties*).

2454-80-R: Ontario Public Service Employees Union, (Applicant) v. 359765 Ontario Inc., (Respondent) v. Employee, (Objector).

Unit #1: "all employees of the respondent in Burlington, save and except floor managers, persons above the rank of floor manager, office staff, persons regularly employed for not more than 24 hours per week". (13 employees in unit).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week in Burlington". (16 employees in unit).

2455-80-R: Ontario Public Service Employees Union, (Applicant) v. 359765 Ontario Inc., (Respondent).

Unit #1: "all employees of the respondent in Oakville, save and except floor managers, persons above the rank of floor manager and persons regularly employed for not more than 24 hours per week". (2 employees in unit).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week in Oakville". (4 employees in unit).

2464-80-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Idylwild Home, (Respondent).

Unit: "all employees of the respondent at London, save and except supervisors, persons above the rank of supervisor, professional nursing staff, office staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (16 employees in unit).

2501-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Maurice Lamoureux Limited, (Respondent).

Unit: "all employees of the respondent at its egg grading plant of South Plantagenet, Ontario, save and

except forepersons, persons above the rank of foreperson, office staff, sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week". (49 employees in unit). (*Having regard to the agreement of the parties*).

2574-80-R: The Canadian Union of Public Employees, (Applicant) v. Dixon Hall Community and Family Centre, (Respondent).

Unit #1: "all employees of the respondent employed in Metropolitan Toronto, save and except executive director, bookkeeper, administrative secretary, senior citizens' co-ordinator, group program co-ordinator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (13 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Certification Dismissed - No Vote Conducted*).

2623-80-R: Amalgamated Clothing and Textile Workers Union - Toronto Joint Board, (Applicant) v. Bernard Athletic Knit & Enterprises Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, sales, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (165 employees in unit). (*Having regard to the agreement of the parties*).

2658-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Winco Restaurants Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at White Oaks Mall, 1105 Wellington Road, London, Ontario, save and except office staff, head chefs, assistant managers and persons above the rank of assistant manager". (36 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2677-80-R: Health, Office and Professional Employees Union, Local 1976, (Applicant) v. Susan Shoe Industries Limited, (Respondent).

Unit: "all clerical and office employees of the Respondent at Hamilton, save and except department heads, and managers and persons above the rank of department head and manager, persons employed in the Design Department, Sales and Advertising Representative, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (36 employees in unit). (*Having regard to the agreement of the parties*).

2698-80-R: Canadian Union of Public Employees, (Applicant) v. The Board of Governors of the Kingston General Hospital, (Respondent).

Unit: "all employees of the respondent in the City of Kingston regularly employed for not more than 22-1/2 hours per week, save and except persons covered by subsisting collective agreements with the Ontario Nurses' Association, the Ontario Public Service Employees Union, The Association of Allied Health Professions: Ontario, Chartered Local Association #3, the Canadian Union of Public Employees and its Local 1974 (support service employees), and the Canadian Union of Public Employees and its Local 1974 (office and clerical employees), supervisors, technical personnel, lab assistants, and employees working in the Personnel Department". (258 employees in unit). (*Having regard to the agreement of the parties*).

2700-80-R: Canadian Union of Public Employees, (Applicant) v. The Lakehead Board of Education, (Respondent).

Unit: "all employees of the respondent, save and except foremen, persons above the rank of foreman, administrative staff, academic staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements". (223 employees in unit). (*Having regard to the agreement of the parties*).

2715-80-R: Le Syndicat Canadien de la Fonction Publique, (Applicant) v. Cours Claudel, (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario, save and except school principal, office and clerical staff, persons paid by the Government of France including volunteers from the National Service during the active portion of their national service, and maintenance staff". (28 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2727-80-R: Canadian Union of Public Employees, (Applicant) v. Kitchener-Waterloo Catholic High School Board of Governors, (Respondent).

Unit: "all office and clerical employees of the respondent in the City of Kitchener, save and except persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (6 employees in unit). (*Having regard to the agreement of the parties*).

2731-80-R: Ontario Public Service Employees Union, (Applicant) v. Metropolitan Separate School Board, (Respondent) v. Ontario Teachers' Federation, (Intervener #1) v. Canadian Union of Public Employees and its Local 1328, (Intervener #2).

Unit: "all office, clerical and technical employees of the respondent in Metropolitan Toronto, save and except supervisors and assistant superintendents, persons above the rank of supervisor and assistant superintendent, and persons covered by a subsisting collective agreement between Ontario Teachers' Federation and the respondent, and persons covered by the collective agreement between Canadian Union of Public Employees and its Local 1328". (65 employees in unit).

2736-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. Rank City Wall Canada Limited, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 4 Forest Laneway, Willowdale, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (6 employees in unit). (*Having regard to the agreement of the parties*).

2737-80-R: United Steelworkers of America, (Applicant) v. Armstrong Jones Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and technical personnel". (7 employees in unit). (*Having regard to the agreement of the parties*).

2738-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Hostess Food Products Limited, (Respondent).

Unit: "all employees of the respondent at London, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (12 employees in unit). (*Having regard to the agreement of the parties*).

2740-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit: "all employees of the respondent at its cash and carry depot in Cornwall, Ontario, save and except assistant manager, persons above the rank of assistant manager, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (2 employees in unit). (*Having regard to the agreement of the parties*).

2748-80-R: United Steelworkers of America, (Applicant) v. Novi Canadian Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period”. (20 employees in unit). (*Having regard to the agreement of the parties*).

2768-80-R: Laundry and Linen Drivers and Industrial Workers Union Local 847, (Applicant) v. Work Wear Corporation of Canada Ltd., (Respondent).

Unit #1: “all employees of the respondent at Barrie, Ontario, save and except salesmen and supervisors, persons above the rank of supervisor and office staff”. (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at Owen Sound, save and except salesmen and supervisors, persons above the rank of supervisor and office staff”. (2 employees in unit). (*Having regard to the agreement of the parties*).

2788-80-R: Hotel and Restaurant Employees and Bartenders International Union, Local 412, (Applicant) v. The Roosevelt Hotel (Sault Ste. Marie) Limited, (Respondent).

Unit: “all employees of the respondent in Sault Ste. Marie, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except manager, persons above the rank of manager and persons covered under a subsisting collective agreement between the applicant and the respondent”. (10 employees in unit).

2789-80-R: Teamsters Chemical Energy and Allied Workers Division Local 2175, (Applicant) v. Canadian Racing Plate Co. Limited, (Respondent).

Unit: “all employees of the respondent at its Niagara Falls plant save and except foremen, persons above the rank of foreman, office and sales staff”. (56 employees in unit). (*Having regard to the agreement of the parties*).

2794-80-R: International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Rexdale Drywall, (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and County of Peel, the Township of Equeusing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (3 employees in unit). (*Clarity Note*).

2799-80-R: Canadian Union of Public Employees, (Applicant) v. The Kenora Public Library, (Respondent).

Unit: “all employees of the respondent save and except chief librarian, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period”. (7 employees in unit). (*Having regard to the agreement of the parties*).

2800-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Norton Safety Products Limited, (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except, foremen, persons above the rank of foreman, office staff, sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period”. (52 employees in unit).

2803-80-R: Ontario Nurses’ Association, (Applicant) v. Bingham Memorial Hospital, (Respondent).

Unit #1: “all registered and graduate nurses engaged in a nursing capacity employed by the respondent in Matheson, Ontario, save and except the Assistant Director of Nursing, persons above the rank of

Assistant Director of Nursing and nurses regularly employed for not more than 24 hours per week". (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses engaged in a nursing capacity employed by the respondent in Matheson, Ontario, who are regularly employed for not more than 24 hours per week, save and except Assistant Director of Nursing and persons above the rank of Assistant Director of Nursing". (5 employees in unit). (*Having regard to the agreement of the parties*).

2805-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. City Bakery (Northern) Limited, (Respondent).

Unit: "all employees of the respondent at North Bay, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (35 employees in unit). (*Having regard to the agreement of the parties*).

2808-80-R: Energy and Chemical Workers Union, (Applicant) v. Absco Aerosols Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Brampton, Ontario, save and except supervisors, those above the rank of supervisor, technical director, purchasing agent, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (34 employees in unit). (*Having regard to the agreement of the parties*).

2816-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Man-Co Construction Ltd., (Respondent).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman".

2824-80-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Chateau Gardens (Queens) Inc., (Respondent).

Unit: "all employees of the respondent at London, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff". (20 employees in unit). (*Having regard to the agreement of the parties*).

2838-80-R: Teamsters Local Union No. 1000, Brewery, Soft Drink, Distillery Distributors and Miscellaneous Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Cott Beverages Ltd., (Respondent).

Unit: "all employees of the respondent working in Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, sales and office staff". (15 employees in unit).

2840-80-R: Canadian Union of Public Employees, (Applicant) v. Hospital General de Hawkesbury and District General Hospital Inc., (Respondent).

Unit: "all lay office and clerical employees of the respondent, at Hawkesbury, Ontario, regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except secretary of the executive director, secretary of the director of finance and personnel, the secretary of the director of nursing, supervisors and persons above the rank of supervisor". (2 employees in unit). (*Having regard to the agreement of the parties*).

0002-81-R: Canadian Union of Public Employees, (Applicant) v. Lincoln County Roman Catholic Separate School Board, (Respondent).

Unit: "all employees of the respondent in Lincoln County, save and except supervisors, persons above the rank of supervisor, and persons covered by subsisting collective agreements between the respondent and Canadian Union of Public Employees, Local 911, and the Administrative Clerical Personnel". (22 employees in unit). (*Having regard to the agreement of the parties*).

0011-81-R: Ontario Public Service Employees Union, (Applicant) v. Rockland Ambulance Service, (Respondent).

Unit: "all employees of the respondent at Rockland, Ontario, save and except owner-operators". (8 employees in unit). (*Having regard to the agreement of the parties*).

0018-81-R: Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, (Applicant) v. Trimarine (Canada) Ltd., (Respondent).

Unit: "all employees of the respondent, in Windsor, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (14 employees in unit). (*Having regard to the agreement of the parties*).

0027-81-R: Canadian Union of Public Employees, (Applicant) v. VS Services Limited, (Respondent).

Unit #1: "all employees of the respondent employed at St. Patrick's Home of Ottawa, in the City of Ottawa, save and except food service managers, supervisors, those above the rank of supervisor, office and clerical staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (13 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at St. Patrick's Home of Ottawa, in the City of Ottawa, who are employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except food service managers, supervisors, those above the rank of supervisor, office and clerical staff". (14 employees in unit). (*Having regard to the agreement of the parties*).

0028-81-R: Canadian Brotherhood of Railway Transport and General Workers, (Applicant) v. Fairmont Railway Motors Limited, (Respondent).

Unit: "all employees of the respondent in Malton, Ontario save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff". (24 employees in unit). (*Having regard to the agreement of the parties*).

0062-81-R: Ontario Public Service Employees Union, (Applicant) v. The Oakville Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the town of Oakville, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except office staff". (7 employees in unit). (*Having regard to the agreement of the parties*).

0064-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Martin-Bower of Canada, Ltd., (Respondent).

Unit: "all employees of the respondent in Orangeville, Ontario, save and except supervisors, those above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement between the respondent and Teamsters Local Union No. 419, affiliated with the

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America". (5 employees in unit). (*Having regard to the agreement of the parties*).

0075-81-R: International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Waco Drywall Services Ltd., (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit). (*Clarity Note*).

Applications Certified Subsequent to a Pre-Hearing Vote

2607-80-R: Canadian Paperworkers Union, (Applicant) v. The Continental Group of Canada Mt. Dennis Plant No. 530/or Somerville Belkin Industries Limited, Packaging Division, (Respondent) v. Office and Professional Employees International Union - Local 131 A.F.L.-C.I.O., (Intervener #1) v. Printing Specialties & Paper Products Union Local No. 466, (Intervener #2).

Unit: "all employees of the Company at 66 Ray Avenue, Toronto, Ontario save and except supervisors, persons above the rank of supervisor, guards, engineers, office staff, sales staff, technical control persons, temporary and probationary employees". (115 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		116
Number of persons who cast ballots	104	
Number of ballots marked in favour of applicant		99
Number of ballots marked in favour of intervener #2		5

2610-80-R: Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, (Applicant) v. Prowler Industries of Ontario, (Respondent).

Unit: "all employees of the respondent at Lindsay, Ontario, save and except foremen and foreladies and persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (95 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		91
Number of persons who cast ballots	90	
Number of ballots marked in favour of applicant		63
Number of ballots marked against applicant		27

2684-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Pepsi Cola Bottling Company of Oshawa, (Respondent) v. Employees Association of Pepsi Cola Oshawa Ltd., (Intervener).

Unit: "all employees in, or working out of its plant at 1100 Burns Street, Whitby, save and except foremen, persons above the rank of foreman, office staff, Area Managers, A.V.D. Managers, Service Managers, Store Merchandisers, and students employed during the summer vacation period". (19 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		19
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		15
Number of ballots marked in favour of intervener		0

Applications Certified Subsequent to a Post-Hearing Vote

1504-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Falcon Metals Inc., (Respondent) v. United Steelworkers of America, (Intervener).

Unit: "all employees of the respondent working at and out of Sudbury, Ontario, save and except foremen, persons above the rank of foreman and office and sales staff". (19 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	16
Number of ballots marked in favour of intervener	4

1746-80-R: Association of Allied Health Professionals: Ontario, (Applicant) v. Toronto East General and Orthopaedic Hospital, Inc., (Respondent) v. Ontario Public Service Employees Union, (Intervener #1) v. Service Employees International Union, Local 204, (Intervener #2) v. Group of Employees, (Objectors).

Unit #1: "All paramedical personnel employed by Toronto East General and Orthopaedic Hospital Inc. at Toronto, save and except charge technologists, assistant chief technologists, persons above the rank of charge technologists and assistant chief technologists, students in training, students employed after regular school hours or during the university or school vacation period, persons regularly employed for not more than 24 hours per week, office and clerical staff and persons covered by subsisting collective agreements with the Service Employees International Union, Local 204, the Canadian Union of Operating Engineers, and the Ontario Nurses' Association". (89 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer	86
Number of persons who cast ballots	78
Number of ballots marked in favour of applicant	66
Number of ballots marked in favour of intervener #1	12

Unit #2: (**See Certification Dismissed - No Vote Conducted**).

1890-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 142, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. St. Thomas Sanitary Collection Service Limited, (Respondent) v. Sanitary Collection Employee's Association, (Intervener), v. Group of Employees, (Objectors).

Unit: "All employees of St. Thomas Sanitary Collection Service Limited working at or out of the Township of Southwold, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (26 employees in unit).

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	23
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	9
Ballots segregated and not counted	4

2219-80-R: Christian Labour Association of Canada, (Applicant) v. C. H. Heist (Canada) v. Ltd., (Respondent) v. The International Brotherhood of Painters and Allied Trades, Local Union 205, (Intervener #1), The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Intervener #2).

Unit: "all employees of the respondent at its repair shop at 20 Depew Street, Hamilton, Ontario, save

and except foreman, persons above the rank of foreman, and sales staff, students employed during the school vacation period and persons covered by subsisting collective agreements. (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		0
Number of ballots marked in favour of No Trade Union		0
Number of ballots marked in favour of intervener		2

2465-80-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Idylwild Home, (Respondent).

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, professional nursing staff, and office staff". (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of the applicant		3
Number of ballots marked against applicant		1

2632-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304, (Applicant) v. Corning Canada Inc., (Respondent) v. American Flint Glass Workers' Union and its Local 1008, (Intervener).

Unit: "all hourly paid employees of the company at its Leaside Plant in Toronto, Ontario, such as maintenance, tank men, machine operators, batch mixers, sealers, machinists, shipping department employees, and all other workers contributing to the production of glassware; however, excluding all salaried workers, department heads, foremen, clerical employees, laboratory employees, technical engineering employees, timekeepers, employees engaged in time motion and method studies, employees of personnel and payroll departments, guards, supervisors, professional employees, and all employees having the right to hire or discharge". (110 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1975-79-R: United Cement, Lime & Gypsum Workers International Union, (Applicant) v. S & F Excavating Ltd., (Respondent) v. The Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

1981-79-R: United Cement, Lime and Gypsum Workers International Union, (Applicant) v. Ben-David Excavating & Contracting Ltd., (Respondent) v. The Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

1656-80-R: Canadian Airline Office Workers Association, (Applicant) v. International Vacations Ltd., (Respondent) v. International Association of Machinists and Aerospace Workers, A.F.L., C.I.O., C.L.C., (Intervener) v. Group of Employees, (Objectors).

1746-80-R: Association of Allied Health Professionals: Ontario (Applicant) v. Toronto East General and Orthopaedic Hospital, Inc., (Respondent) v. Ontario Public Service Employees Union, (Intervener #1) v. Service Employees International Union, Local 204, (Intervener #2) v. Group of Employees, (Objectors).

Unit #1: (See **Bargaining Agents Certified - Subsequent to Post-Hearing Vote**).

1987-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Pasinto Haulage Inc., (Respondent) v. Teamsters Local Union 879, (Intervener).

2001-80-R: United Steelworkers of America, (Applicant) v. Northway Industries of Balfour Ltd., (Respondent).

2224-80-R: Professional Institute Association, (Applicant) v. The Professional Institute of the Public Service of Canada, (Respondent) v. The Professional Institute Staff Association, (Intervener).

2574-80-R: The Canadian Union of Public Employees, (Applicant) v. Dixon Hall Community and Family Centre, (Respondent).

Unit #1: (See **Bargaining Agents Certified - No Vote Conducted**).

Unit #2: "all employees of the respondent employed in Metropolitan Toronto for not more than twenty-four hours per week and students employed during the school vacation period". (10 employees in unit).

2696-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Hiawathaland Hotels Limited (Operating) The Windsor Park Hotel, (Respondent) v. Hotel and Restaurant Employees' and Bartenders International Union and its Local 412, (Intervener).

2760-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. Zolty Holdings Dev., (Respondent).

2790-80-R: The Canadian Union of Educational Workers, (Applicant) v. Queen's University, (Respondent) v. Canadian Union of Public Employees, (Intervener).

Certifications Dismissed Subsequent to a Pre-Hearing Vote

2739-8-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Bowes Company Limited, (Respondent).

Unit: "All employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period". (113 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	111
Number of persons who cast ballots	110
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	46
Number of ballots marked against applicant	63

Certifications Dismissed Subsequent to a Post-Hearing Vote

2242-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. Deer Park Estates, (Respondent) v. Group of Employees, (Objectors).

Unit: "All construction labourers in the employ of the respondent in the industrial, commercial and

institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

Number of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		2

2280-80-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bratt Construction Company Limited, (Respondent).

Unit: "All carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman". (20 employees in unit).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		11

2299-80-R: Ontario Public Service Employees Union, (Applicant) v. Alpha Laboratories Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "All employees of Alpha Laboratories Inc., working in and out of Metropolitan Toronto, Pickering, and Cannington, Ontario, save and except director, accountant, and salesperson". (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list at start of vote		25
Number of persons who cast ballots	24	
Number of segregated ballots cast by persons whose name appear on voters list	1	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		15

2541-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Champion Spark Plug Company of Canada, Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "All office and clerical employees of the respondent at Windsor, Ontario, save and except supervisors, assistant supervisors, persons above the rank of supervisor, co-ordinators, assistant chief inspector, personnel services administrator, salaried payroll clerk, controller, manufacturing cost analyst, secretary to the president, secretary to the vice-president and operations manager, secretary to the plant manager, secretary to the industrial relations manager, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements with Local 195, U.A.W. (35 employees in unit). (*Having regard to the agreement of the parties*).

APPLICATIONS FOR CERTIFICATION WITHDRAWN

2155-80-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 1133, 1747, 1304, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Pinehurst Woodworking, (Respondent).

2345-80-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Sun Valley Pools Ltd., (Respondent).

2716-80-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Liquiflame Oils, Division of Ultramar Canada Inc., (Respondent).

2719-80-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Lodge #128, (Applicant) v. A. J. Custom Welding Ltd., (Respondent).

2723-80-R: Local Union 636 of the International Brotherhood of Electrical Workers (AFL-CIO-CLC), (Applicant) v. Anderson Township, (Respondent).

2726-80-R: Canadian Union of Public Employees, (Applicant) v. Prescott & Russell Association for the Mentally Retarded, (Respondent).

2728-80-R: Hotel and Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant Employees and Bartenders' International Union, (Applicant) v. Winco Restaurants c.o.b. Steak 'n' Burger, Mug 'n' Burger, Stop 'n' Go, Colonels Lounge at Devonshire Mall, (Respondent).

2729-80-R: Hotel and Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant Employees and Bartenders International Union, (Applicant) v. Winco Restaurants c.o.b. Steak 'n' Burger, Mug 'n' Burger, Stop 'n' Go, Colonels Lounge at Devonshire Mall, (Respondent).

2796-80-R: International Association of Bridge, Structural and Ornamental Ironworkers Local 721, (Applicant) v. Anchor Shoring Ltd., (Respondent).

0035-81-R: Hotel, Motel and Restaurant Employees, and Beverage Dispensers' Union Local 757, Thunder Bay, of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O., (Applicant) v. Red Oak Inn, (Respondent).

0118-81-R: Hotel, Motel and Restaurant Employees and Beverage Dispensers' Union Local 757, Thunder Bay, of the Hotel and Restaurant Employees and Bartenders' International Union, A.F.L.-C.L.C., (Applicant) v. Landmark Motor Inn, (Respondent).

APPLICATIONS FOR ACCREDITATION

2747-80-R: Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261, Ottawa, (Applicant) v. Saga Canadian Management Services Limited, (Respondent). (*Withdrawn*).

2826-80-R: The Hotel, Restaurant and Cafeteria Employees Union, Local 75 Toronto, Ontario of the Hotel and Restaurant Employees and Bartenders International Union AFL-CLC-CIO, (Applicant) v. Bristol Place Hotel, (Respondent). (*Withdrawn*).

0063-81-R: United Cement, Lime and Gypsum Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Andola Fibres Ltd. and Associated Company, (Respondents). (*Withdrawn*).

APPLICATIONS UNDER SECTION 1(4)

1628-80-R: Ontario Public Service Employees Union, (Applicant) v. Cybermedix Limited and S & M Laboratories Ltd., (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1812-80-R: James Bardeau, (Applicant) v. Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Stran-Steel Division, Westeel-Rosco Limited, (Intervener).

Unit: "All employees of its Stran-Steel Division, at its Richmond Hill, Ontario plant, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (93 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		88
Number of persons who cast ballots	57	
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		53

2144-80-R: Gerald Cobham, (Applicant) v. International Union United Plant Guard Workers of America, Local 1962, (Respondent) v. Group of Employees, (Objectors).

Unit: "All employees of the employer at his plant located at 62 Bertal Avenue, (formerly 164 Avenue Road), save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week". (37 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		37
Number of persons who cast ballots	29	
Number of ballots marked in favour of respondent		7
Number of ballots marked against respondent		22

2303-80-R: Stephen W. Morrison, (Applicant) v. Canadian Paperworkers Union, Local #1199, (Respondent).

Unit: "All office and clerical employees of MacMillan-Bloedel packaging at its Guelph plant 589 save and except supervisors, persons above the rank of supervisor, salesmen and sales trainees, secretary to the plant manager, industrial relations assistant, students employed during the school vacation period and persons covered by a subsisting collective agreement between the Continental Group of Canada Ltd. and the Canadian Paperworkers Union, Local 1199". (14 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		13

2469-80-R: John Mitchell Campbell, (Applicant) v. Local Union 1590 of the International Brotherhood of Electrical Workers, (Respondent) v. Cable Tech Wire Company Limited, (Intervener).

Unit: "All employees of Cable Tech Wire Company Limited in the Town of Whitchurch Stouffville, save and except foremen, those above the rank of foreman, office, technical and sales staff and students employed during the school vacation period". (104 employees in unit). (*Dismissed*).

2733-80-R: W. J. Weller, (Applicant) v. Local 1144 of the Canadian Paperworkers Union, (Respondent) v. Becon Envelopes, A Division of Barbecon Incorporated, (Intervener). (*Withdrawn*).

APPLICATIONS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

2208-80-OH: Dan James, (Complainant) v. Brewers Warehousing Company Limited, (Respondent). (*Withdrawn*).

2637-80-OH: Ben Glowczynski and United Steelworkers of America, (Complainant) v. Union Miniere Explorations and Mining Corporation Limited, (Respondent). (*Dismissed*).

2671-80-OH: United Steelworkers of America, (Complainant) v. National Steel Car Limited, (Respondent). (*Withdrawn*).

2683-80-OH: Gerry Robinson, (Complainant) v. Airloc Insulating Ltd., (Respondent). (*Withdrawn*).

2712-80-OH: Mr. Naresh Naipaul, (Complainant) v. Dr. Dharam Singal and his employer the Faculty of Health Sciences, McMaster University and Mr. Naipaul's employer Chedoke-McMaster Hospital McMaster Division, (Respondent). (*Withdrawn*).

2809-80-OH: Clive Harris, (Complainant) v. Metal Flo Corporation Ltd., (Respondent). (*Withdrawn*).

2855-80-OH: The United Brotherhood of Carpenters and Joiners of America, Local Union 3054, (Complainant) v. General Coach Ltd., (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2785-80-M: Work Wear Corporation of Canada Ltd., (Applicant) v. Retail, Wholesale and Department Store Union, Local 582, AFL:CIO:CLC, (Respondent). (*Granted*).

2786-80-M: Work Wear Corporation of Canada Ltd., (Applicant) v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 55

1629-80-R: Ontario Public Service Employees Union (Applicant) v. Cybermedix and S & M Laboratories Ltd., (Respondent). (*Withdrawn*).

2221-80-R: The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) and its Local 195, (Applicant) v. Maple Leaf Metal Products Inc., (Respondent). (*Granted*).

2556-80-R: International Beverage Dispensers' and Bartenders' Union, Local 280, (Applicant) v. Edward Tjan, carrying on business as the Colonial Tavern, (Respondent). (*Granted*).

2812-80-R: International Brotherhood of Painters and Allied Trades, Local 200, (Applicant) v. Frederick Grodde Limited and Peinture Grodex Limitee, (Respondent). (*Granted*).

JURISDICTIONAL DISPUTE

0045-81-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552 and International Brotherhood of Electrical Workers, Local 773, (Complainants) v. (1) International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (2) Wm. Roberts Electrical & Mechanical Ltd. and (3) Donald Stewart, (Respondents). (*Dismissed*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

- 1414-78-U:** Labourers' International Union of North America, Local 183, (Complainant) v. Thames Steel Construction Ltd., John Streefkirk and E. Lambton, (Respondent). (*Withdrawn*).
- 2440-79-U:** Amalgamated Clothing & Textile Workers Union, (Complainant) v. Tuxedo Junction United, (Respondent). (*Withdrawn*).
- 2345-79-U:** International Union, United Automobile, Aerospace, Agricultural Implement Workers of America - U.A.W., (Complainant) v. Daymond Limited, (Respondent). (*Withdrawn*).
- 1763-80-U:** Myrna Wood, (Applicant) v. Canadian Red Cross Blood Transfusion Service, Hamilton Centre, (Respondent). (*Granted*).
- 1799-80-U:** Retail, Wholesale and Department Store Union, Local 414, (Complainant) v. Country Style Donuts, (Respondent). (*Withdrawn*).
- 1863-80-U:** Toronto Typographical Union, No. 91, (I.T.U.), (Complainant) v. Accutext Limited, (Respondent). (*Withdrawn*).
- 2076-80-U:** International Association of Machinists and Aerospace Workers, (Complainant) v. City-Wide Scale Co. Ltd., (Respondent). (*Dismissed*).
- 2103-80-U:** Suzanne Hebert-Vaillant, (Complainant) v. Prescott and Russell County Roman Catholic Separate School Board, (Respondent). (*Granted*).
- 2237-80-U:** Domingo Ramos, (Complainant) v. Anderson Metal Industries Inc., (Respondent). (*Withdrawn*).
- 2322-80-U:** Accutext Limited, (Complainant) v. James Buller, in his personal capacity; James Buller, in his capacity as President of Toronto Typographical Union - No. 91; and Toronto Typographical Union No. 91 (ITU), (Respondent). (*Withdrawn*).
- 2396-80-U:** Toronto Motion Picture Projectionists' Union, Local 173, of The International Alliance of Theatrical Stage Employees and Moving Pictures Machine Operators of the United States and Canada, (Applicant) v. 365414 Ontario Ltd. and Hugo Albel, (Respondents). (*Granted*).
- 2405-80-U:** International Beverage Dispensers' and Bartenders' Union, Local 280, (Complainant) v. Gerald E. Fowlie, carrying on business as the Colonial Tavern, (Respondent). (*Granted*).
- 2419-80-U:** Michael D. McKelvey, (Complainant) v. Sudbury Mine, Mill & Smelter Workers Union, Local 598, (Respondent) v. Falconbridge Nickel Mines, (Intervener). (*Dismissed*).
- 2451-80-U:** Camillo Manfredi, (Complainant) v. Canadian Construction Building Maintenance and General Workers' Union, (Respondent) v. Campeau Corporation, (Intervener). (*Dismissed*).
- 2470-80-U:** Peter George, (Complainant) v. United Steelworkers of America Local 2859 and Babcock and Wilcox Canada Ltd., (Respondents). (*Withdrawn*).
- 2483-80-U:** Camillo Manfredi, (Complainant) v. Canadian Construction Building Maintenance and General Workers' Union, (Respondent) v. Campeau Corporation (Intervener). (*Dismissed*).
- 2543-80-U:** Teamsters Local Union 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Weldco Inc., (Respondent). (*Withdrawn*).
- 2545-80-U:** Retail, Wholesale and Department Store Union, AFL:DIO:CLC:, (Complainant) v. Beatrice Foods (Ontario) Limited, Model Dairy Division, (Respondent). (*Withdrawn*).

2553-80-U: Alexandre Savoie, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local 2486, (Respondent). (*Withdrawn*).

2557-80-U: John F. Semach, (Complainant) v. Mullers Meats Limited, (Respondent). (*Withdrawn*).

2558-80-U: Robert Adamson, (Complainant) v. Mullers Meats Limited, (Respondent). (*Withdrawn*).

2559-80-U: Stephen Bourdignon, (Complainant) v. Muller's Meats Limited, (Respondent). (*Withdrawn*).

2568-80-U: The International Beverage Dispensers' & Bartenders Union, Local 280, (Complainant) v. Cloverleaf Hotel Division of MIB Holdings Ltd., (Respondent). (*Granted*).

2577-80-U: Ontario Public Service Employees Union, (Complainant) v. Fleetwood Ambulance Services, (Respondent). (*Withdrawn*).

2580-80-U: The International Beverage Dispensers' & Bartenders Union, Local 280, (Complainant) v. Cloverleaf Hotel Division of MIB Holdings Ltd., (Respondent). (*Dismissed*).

2589-80-U: Gerald Nogiec, (Complainant) v. L.U. No. 304 Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Respondent). (*Withdrawn*).

2592-80-U: Pravesh Suri, (Complainant) v. Office and Professional Employees' International Union, A.F.L., C.I.O., C.L.C., - Local 290, (Respondent) v. Cumis Life Insurance Co., (Intervener). (*Dismissed*).

2600-80-U: Canadian Union of Public Employees and its Local 1715, (Complainant) v. The Corporation of the United Counties of Stormont, Dundas & Glengary, (Respondent). (*Withdrawn*).

2612-80-U: James A. Spencer, (Complainant) v. Alfie Cormier and International Brotherhood of Boilermakers et al, Local 128, (Respondents). (*Withdrawn*).

2626-80-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. McDonalds Restaurants of Canada, (Respondent). (*Withdrawn*).

2627-80-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. Emile Viau (Glengary Bus Line) Inc., (Respondent). (*Granted*).

2654-80-U: Domingo Ramos, (Complainant) v. Anderson Metal Industries Inc., (Respondent). (*Withdrawn*).

2663-80-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) v. Idylwild Rest Home, (Respondent). (*Withdrawn*).

2687-80-U: Ontario Public Service Employees Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondent). (*Granted*).

2690-80-R: Norman Washington DePulzer, (Complainant) v. United Steelworkers of America, Local Union 6754 and Vulcan Industrial Packaging Limited, (Respondents). (*Withdrawn*).

2711-80-U: Canadian Union of Public Employees, (Complainant) v. The Sudbury Board of Education, (Respondent). (*Withdrawn*).

2724-80-U: Bakery, Confectionary and Tobacco Workers International Union, Local 264, (Complainant) v. Magic Pantry Food Inc., (Respondent). (*Withdrawn*).

2745-80-U: Mr. Doug McFarlane, Mr. Ken Burns, (Complainants) v. Local Union #647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, (Respondent). (*Withdrawn*).

2753-80-U: Gary Allard, (Complainant) v. U.A.W. Local 636, and Standard Tube Canada (Respondents). (*Withdrawn*).

- 2754-80-U:** Canadian Brotherhood of Railway Transport & General Workers, (Complainant) v. Sonic Transport Systems Limited, (Respondent). (*Withdrawn*).
- 2773-80-U:** Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Complainant) v. J. D. Coad Construction Co. Ltd. and Construction Workers Local 52, Affiliated with the Christian Labour Association of Canada, (Respondents). (*Dismissed*).
- 2774-80-U:** Ontario Public Service Employees Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondents). (*Granted*).
- 2775-80-U:** Severio Galizia, (Complainant) v. Labourer's International Union Local 1089, (Respondent). (*Withdrawn*).
- 2777-80-U:** United Steelworkers of America, (Complainant) v. Canadian Business Machines Limited Sherall Steel Ltd., (Respondent). (*Withdrawn*).
- 2778-80-U:** Food and Service Workers of Canada, (Complainant) v. Consolidated Maintenance Services Limited, (Respondent). (*Withdrawn*).
- 2782-80-U:** The Oshawa Group Limited, (Complainant) v. Nicola Biagi et al, (Respondents). (*Withdrawn*).
- 2784-80-U:** Ontario Public Service Employees Union, (Complainant) v. The Ontario Metis and Non-Status Indian Association, (Respondent). (*Withdrawn*).
- 2787-80-M:** International Union of Operating Engineers Local 793, (Applicant) v. E. S. Fox Limited and Employer Bargaining Agency, (Respondents). (*Withdrawn*).
- 2792-80-U:** David Sorbara, (Complainant) v. T. C. Industries, (Respondent). (*Withdrawn*).
- 2802-80-U:** United Steelworkers of America, (Complainant) v. Novi Canadian Limited, (Respondent). (*Withdrawn*).
- 2811-80-U:** Ontario Public Service Employees Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondent). (*Granted*).
- 2829-80-U:** I.U.E. Local 564, (Complainant) v. Federal Pioneer Ltd., (Respondent). (*Withdrawn*).
- 2835-80-U:** International Union of Operating Engineers, Local 796, (Complainant) v. Lamarguette Nursing Home, (Respondent). (*Withdrawn*).
- 2836-80-U:** Ishtiaq Syed and Anwar Ali Chaudhary, (Complainants) v. Toronto Civic Employees Union Local 43, (Respondent). (*Withdrawn*).
- 0007-81-U:** Michael Zarubiak, (Complainant) v. Ronald's Printing, (Respondent). (*Withdrawn*).
- 0016-81-U:** Albert J. Gibson, (Complainant) v. Canadian Chemical Workers Union Local 39, (Respondent). (*Withdrawn*).
- 0026-81-U:** United Food and Commercial Workers International Union Footwear Division Local 233-F, C.L.C., A.F.L. & C.I.O., (Complainant) v. Susan Shoe Industries Limited, (Respondent). (*Withdrawn*).
- 0072-81-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Maurice Lamoureux Ltd., (Respondent). (*Withdrawn*).
- 0081-81-M:** International Association of Heat and Frost Insulators and Asbestos Workers' Local 95, (Applicant) v. Standard Insulation Limited, (Respondent). (*Withdrawn*).
- 0122-81-U:** TC Industries of Canada Ltd., (Complainant) v. Terry Cortney, Murray Jackson and Dave Sorbara (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1141-80-M: Lesmith Limited, (Employer) v. United Cement, Lime & Gypsum Workers International Union, (Trade Union). (*Withdrawn*).

1483-80-M: Canadian Union of Public Employees Local 1007, (Applicant) v. Corporation of the Township of West Lincoln, (Respondent). (*Granted*).

1654-80-M: Canadian Union of Public Employees, (Applicant) v. The Corporation of the City of Port Colborne, (Respondent). (*Denied*).

1688-80-M: Cochrane Temiskaming Resource Centre, (Applicant) v. Ontario Public Service Employees Union, (Respondent). (*Denied*).

2062-80-M: Ontario Nurses' Association, (Applicant) v. Ontario Nurses' Association Staff Union, (Respondent). (*Withdrawn*).

2688-80-M: The Canadian Union of Public Employees and its Local 1758, (Trade Union) v. Red Lake Board of Education, (Employer). (*Withdrawn*).

APPLICATION FOR DETERMINATION UNDER SECTION 96

2832-80-M: The Corporation of the United Counties of Stormont, Dundas & Glengarry, (Employer) v. Canadian Union of Public Employees and its Local 1715, (Trade Union). (*Terminated*).

APPLICATIONS UNDER SECTION 112a

1920-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. Ontario Hydro, (Respondent). (*Withdrawn*).

2295-79-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Master Insulation Company Limited, (Respondent). (*Granted*).

0100-80-M: Corporation of the City of Timmins, (Applicant) v. Canadian Union of Public Employees and its Local 434, (Respondent). (*Withdrawn*).

1099-80-M: Labourers' International Union of North America, Local 509, (Applicant) v. John Hayman & Sons Company, Limited, (Respondent). (*Granted*).

1100-80-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Harbridge & Cross Limited, (Respondent). (*Granted*).

1639-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 222, (Applicant) v. Thomas Construction (Galt) Limited, (Respondent). (*Dismissed*).

1664-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Eagle Mountain Contracting Limited, (Respondent). (*Granted*).

1677-80-M: Labourers' L. 493, (Complainant) v. Bradford Precast Installers, (Respondent). (*Withdrawn*).

2198-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 446, (Applicant) v. Newman Brothers Company Limited, (Respondent). (*Withdrawn*).

2199-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 446, (Applicant) v. Newman Brothers Company Limited, (Respondent). (*Withdrawn*).

2238-80-M: International Union of Operating Engineers, Local 793, (Applicant) v. Dufferin Construction Company, (Respondent). (*Withdrawn*).

2254-80-M: International Union of Operating Engineers, Local 793, (Applicant) v. Dufferin Construction Company, (Respondent). (*Withdrawn*).

2262-80-M: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and United Association of Journeymen and Apprentices Plumbing and Pipefitting Industry of the United States and Canada, Local 463, (Applicants) v. Watts & Henderson Limited, (Respondent). (*Dismissed*).

2263-80-M: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463, (Applicants) v. State Electric Company Limited, (Respondent). (*Dismissed*).

2278-80-M: International Union of Operating Engineers, Local 793, (Applicant) v. Dufferin Construction Company, (Respondent). (*Withdrawn*).

2311-80-M: United Brotherhood of Carpenters and Joiners of America, Local 249, (Applicant) v. Hugh Murray (1974) Limited, and Trend Building Systems, (Respondents). (*Withdrawn*).

2362-80-M: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. J. P. Goddard Holdings Ltd., (Respondent). (*Granted*).

2758-80-M: Construction Workers Local #52 of the Christian Labour Association of Canada, (Applicant) v. William Finkle Machine Limited, (Respondent). (*Withdrawn*).

2770-80-M: Marble Tile and Terrazzo Union, Local 31 affiliated with the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Perfect Tile & Mosaic Company Limited, (Respondent). (*Granted*).

2776-80-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, (Applicant) v. Continental Iron & Steel Works Division of Anvil Metal Industries Ltd., (Respondent). (*Granted*).

2791-80-M: International Brotherhood of Painters and Allied Trades, Local 114, (Applicant) v. Biron Painting & Decorating Limited, (Respondent). (*Granted*).

2797-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. S. I. Guttman Ltd., (Respondent). (*Withdrawn*).

2798-80-M: The Carpenters Employer Bargaining Agency, (Applicant) v. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America, and Local 18, (Respondents). (*Withdrawn*).

2834-80-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. W. J. Carpenter Management Group, (Respondent). (*Withdrawn*).

2851-80-M: Chatham Construction Workers Association, Local No. 53, CLAC, (Applicant) v. Fahringer Mechanical Contracting Ltd., (Respondent). (*Withdrawn*).

2852-80-M: Carpenters' District Council of Toronto and Vicinity on behalf of Local 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Army's Construction Company Limited, (Respondent) v. (*Granted*).

2853-80-M: Labourers' International Union of North America, Local 183, (Applicant) v. The Coventry Group Limited, (Respondent). (*Withdrawn*).

0009-81-M: International Brotherhood of Painters and Allied Trades and the Ontario Council of Painters and Allied Trades and Local 1494, Windsor, Ontario, (Applicant) v. National Painting & Decorating Corporation, (Respondent). (*Withdrawn*).

0020-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Dynamic Drywall, (Respondent).

0025-81-M: Labourers' International Union of North America, Local 1089, 271 Devine Street, Sarnia, Ontario, (Applicant) v. Sandercock Construction (1976) Limited, 763 Chester Street, Sarnia, Ontario, (Respondent). (*Withdrawn*).

0041-81-M: Dover Construction (Can.) Ltd., (Applicant) v. International Union of Elevator Constructors and its Local No. 90, (Respondent). (*Withdrawn*).

0046-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. (1) Cumbustion Engineering Super-Heater Ltd. and (2) Metropolitan Plumbing & Heating Contractors Association, A Division of the Mechanical Contractors Association Toronto, (Respondent). (*Withdrawn*).

0049-81-M: United Association of Journeymen and apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. G. Bradler Mechanical Limited, (Respondent). (*Withdrawn*).

0050-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Iremo Corporation Limited, (Respondent). (*Granted*).

0051-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. William Roberts Electrical & Mechanical Ltd., (Respondent). (*Withdrawn*).

0052-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Norpipe Construction Limited, (Respondent). (*Withdrawn*).

0055-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Dietrich Mechanical Systems Limited, (Respondent). (*Withdrawn*).

0073-81-M: United Brotherhood of Carpenters & Joiners of America Local 18, (Applicant) v. Star-Tile, (Respondent). (*Withdrawn*).

0080-81-M: International Association of Heat and Frost Insulators and Asbestos Workers' Local 95, (Applicant) v. John Kovach Insulation Limited, (Respondent). (*Withdrawn*).

0082-81-M: International Association of Heat and Frost Insulators and Asbestos Workers' Local 95, (Applicant) v. Korel Insulation Co. Limited, (Respondent). (*Granted*).

0103-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Chatham Masonry Limited, (Respondent). (*Granted*).

0113-81-M: International Brotherhood of Painters and Allied Trades, Local 200, (Applicant) v. Frederick Grodde Limited and Peinture Grodex Limitee, (Respondents). (*Granted*).

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1091-80-U: Gary S. Dosanjh, (Complainant) v. U.A.W. Local 124 Plant Committee, (Respondent) v. Titan Proform Co. Ltd., (Intervener). (*Denied*).

1499-80-U: The Association of General Studies Teachers in Hebrew Day Schools, (Complainant) v. The Associated Hebrew Schools, (Respondent). (*Denied*).

2043-80-R: Canadian Union of Industrial Employees, (Applicant) v. Anderson Metal Industries Inc., (Respondent) v. Group of Employees, (Objectors). (*Denied*).



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**A Monthly Series of Decisions from the
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0163-81-U Terry Noble, Complainant, v. United Steelworkers of America, Local Union 2251, Respondent, v. **The Algoma Steel Corporation, Limited**, Intervener.

Duty of Fair Representation-Section 79-Success of grievance adversely affecting number of other employees-Union withdrawing grievance after presenting to membership-Whether union violated own by-laws-Whether breach of section 60

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *Terry Noble and Linda Swigger for the complainant; Brian Shell, H. MacKenzie and Jack Ostroski for the respondent; no one for the intervener.*

DECISION OF THE BOARD; June 10, 1981

1. This is a complaint under section 79 of *The Labour Relations Act*, alleging that the respondent trade union has dealt with the complainant in a manner that is contrary to the provisions of section 60 of the Act. That section inscribes into our legislation a duty of fair representation in the following terms:

60. A trade union or council of trade unions so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union or council of trade unions, as the case may be.

Specifically, this complaint focusses upon the decision of the respondent to withdraw a grievance filed by the complainant from arbitration. Some brief background to the complainant's grievance is essential to understanding the present complaint.

2. The complainant, Mr. Terry Noble, has been employed with the intervener steel company for 13 years, and is now an electronic repairman. In the period leading up to his grievance, he had been working "days" on a regular basis, and receiving, in addition to his eight-hour workshift, a half-hour unpaid lunch. Article 5.10.11 of the collective agreement currently in force provides:

Employees other than those who receive time off without pay for lunch as referred to in Article 5.11.10 shall under normal circumstances have a period of 20 minutes at an appropriate time during working hours for the purpose of eating lunch.

As can be seen, those employees for whom the company may schedule a half-hour unpaid lunch, in addition to the eight-hour shift, appears to be those employees covered by Article 5.11.10 of the agreement. That Article sets out the parties' definition of a "dayworker", and provides (in markedly ambiguous terms):

For the purposes of this article, an employee is a dayworker on a day for

which he is scheduled to begin work at or after 7:00 a.m. and to finish work at or before 6:00 p.m. (with or without time off without pay for lunch) *on a job which is not at any time part of a two or three shift operation.*

(emphasis added)

The underlined words in Article 5.11.10 were considered in a 1974 arbitration award dealing with another employee's grievance for premium as a result of a short turnaround in his work schedule. The protection in the collective agreement against short turnarounds applied only to "dayworkers". The board of arbitration found that since the grieving employee at the time of the change in his schedule had been assigned to a specific job or task (i.e., oxygen vessel rebuild) which was carried out in part as a two or three-shift operation, he was not a "dayworker" within the meaning of Article 5.11.10.

3. In his grievance giving rise to these proceedings, Mr. Noble sought to establish that the 1974 arbitration award meant that he himself was not a "dayworker", and could accordingly not be required to spend an extra half-hour at the plant for the purpose of an unpaid lunch. Rather, Mr. Noble would be entitled to have his lunch *inclusive* of his eight-hour shift, and to go home a half-hour earlier. The details of Mr. Noble's interpretation of the arbitration award are not before the Board, and the Board makes no assessment of the validity of his position. The plant grievance committee supported Mr. Noble in his grievance, and when the company denied the grievance on the basis that Mr. Noble was a "dayworker", the grievance was posted to arbitration.

4. Shortly thereafter, on March 11th, 1981, the company wrote to the respondent and proposed a "settlement" of Mr. Noble's grievance. The company proposed to accept the position put forward in Mr. Noble's grievance, but noted in return that his restrictive interpretation of "dayworker" would render a variety of provisions in the collective agreement (relating to "dayworkers") suddenly inapplicable to a large number of employees in the plant. These provisions entailed such matters as seniority preference for daywork schedules and premiumed compensation in the event of call-outs or short-notice changes in scheduling. The company letter closed with the words:

If it is your intent to accept all of the foregoing results of the Company allowing the grievance, please advise me accordingly and the draft answer will be finalized.

On March 17th, Mr. Jack Ostroski, the President of the respondent Local, invited Mr. Noble to his office, and suggested, based on the company's position, that Mr. Noble withdraw his grievance. Mr. Noble refused. Mr. Ostroski then indicated that the grievance would be discussed at the general membership meeting scheduled for the next day. The grievance was in fact placed on the agenda for the meeting, and discussed at length. Mr. Noble does not complain about the manner in which notice was given of his grievance being raised. What he does complain about (as he did at the meeting) is the fact that the grievance was put before a general membership meeting while still active in the grievance procedure. In support of this objection, the complainant cites paragraph 14 of the respondent's General By-Laws, which reads:

14. The Grievance Committee shall consist of (5) five members elected in

accordance with the International Constitution and the Local Union By-Laws.

- (a) Grievances shall not come before the Board of Delegates or General Meetings, unless they have been dealt with through the proper channels as provided in the Working Agreement.

...

Mr. Noble's objection was overruled, and he participated in the debate on his grievance. After the discussion, a motion was put to table the matter (i.e., not proceed with it at that meeting), but this motion was defeated. It was then moved by Mr. Mancini, the Chairman of the Grievance Committee which had originally supported Mr. Noble, to withdraw Mr. Noble's grievance without prejudice, and submit the whole issue to negotiations (the collective agreement expires July 31, 1981). Mr. Ostroski, who chaired the meeting, made a clear recommendation in favour of the motion, and the motion was passed. Mr. Ostroski then wrote to the plant grievance committee instructing them to withdraw Mr. Noble's grievance. The committee did so, and Mr. Noble filed the present complaint.

5. The first point to be dealt with is Mr. Noble's complaint that consideration of his grievance at a general membership meeting while it was still pending was contrary to the provisions of the respondent's own by-laws. While the Board proceeds cautiously before embarking on an interpretation of a trade union's internal documents, such an inquiry may be unavoidable in complaints by individual members of a violation of section 60. This is so because the fact that a trade union may have ignored its own constitution or by-laws may itself be evidence of arbitrariness or discrimination. In this case the Board, based on the material before it, is inclined to view section 14(a) of the respondent's by-laws as simply barring *members* from taking their own grievances before the general membership prior to exhausting the normal grievance procedures provided in the collective agreement. This apparent intent is reinforced by section 14(b), which reads:

If a member wishes to appeal a decision of the Grievance Committee, the member or members of his representative, who must be a member of the Local Union shall within 15 days of the date the grievor receives the decision of the Grievance Committee submit a written notice to the President of Local Union 2251 of the appeal. This appeal shall then be dealt with at the next regular General Meeting. Any further appeals shall be dealt with in accordance to the International Constitution.

If the Local's executives themselves feel that a grievance is important enough to take to the membership for decision, it would make little sense to place upon section 14(a) a construction which forces the executive to permit the matter to proceed to arbitration, before suggesting to the membership that they nullify the result.

6. On the main branch of Mr. Noble's complaint, the Board has noted on a number of occasions that the administration of the collective agreement is an extension of the trade union's status as exclusive bargaining agent, and that an employee has no absolute right to have his grievance arbitrated. In *Antonio Melillo*, [1976] OLRB Rep. Oct. 613, for example the Board commented as follows:

14. Most unfair representation complaints arise, as did this one, in the context of a union decision not to carry a grievance to arbitration. It is well established that the duty imposed on a trade union by section 60 does not require it to process through to arbitration every grievance which a bargaining unit employee wishes proceeded with. An employee has no absolute right to have his grievance arbitrated (see *Gebbie and Longmoore* [1973] OLRB Rep. Oct. 519). The key assumption underlying this legal conclusion is that the settlement of disputes and grievances of employees under the terms of a collective agreement is an extension of the collective bargaining process, a process in which the interests of particular individuals must of necessity yield to the *legitimate* interest of the group.

...

16. There is another group interest in the settlement of grievances which applies even to cases which might succeed at arbitration. This interest was given expression in *Rayonier and I.W.A.*, Local 1-217, [1975] 2 Can. LRBR 196, a recent decision of the British Columbia Labour Relations Board interpreting a B.C. provision with language almost identical to our own. After adopting the Ontario position that an employee has no absolute right to have his grievance arbitrated, the B.C. Board stated:

“While a grievance may originally be brought by one individual, it is not unusual for it to involve a conflict with other employees as well as with the employer. Occasionally, this is true even in the facts of a particular case, but more often it arises from the implications of the general interpretation of the agreement upon which the particular grievor is relying. By necessity, a collective agreement speaks obliquely to many new and unforeseen problems arising during the course of its administration. Rather than relying on the arbitrator’s interpretation of the vague language of the agreement drafted a long time ago, it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the needs of the operation and are thus best able to improvise a satisfactory solution. Again, if the employees are to have the benefit of this process and of the willing participation of the employer in it, the law must allow the parties to make the settlement binding, rather than allowing a dissenting employee to finesse it by pressing his grievance to arbitration. As Archibald Cox put it: ‘Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the administration of a contract as if there were always a ‘right’ interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound industrial

relations—a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievances and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise...When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal.' *Cox, Law and the National Labour Policy*, at pp. 83-88."

Professor Cox in that article further discussed the role played by the union in weighing or compromising competing interests, and went on to say:

... In judging whether the compromise is arbitrary one should take into account the fact that negotiation of the collective contract was the result of a group endeavor, and also such other circumstances as the merits of the claim, the effect upon other employees, the future implication of the settlement, and any evidence of discrimination or arbitrary "horse trading".

7. These early musings of the learned professor are consistent with the principles which this Board and others developed in the protection of minority rights, and are applicable to the case at hand. The Board finds nothing in the facts which the respondent was forced to consider, nor in its manner of resolving the dilemma, which would cause the Board to conclude that the respondent's actions constituted a violation of section 60. The respondent honestly and openly weighed the competing interests at stake, and made a decision in accordance with its responsibility to do so. The complainant conceded in his testimony that Mr. Ostroski had made clear to him the respondent's concerns and the basis for the respondent's position. Mr. Noble conceded as well that a large number of employees would no longer have applied to them the clauses referred to in the company's letter if his grievance were settled the way he proposed, but asked: "Who was going to look after my half-hour?"

8. It should be noted that neither the company nor the respondent trade union ultimately considered Mr. Noble's grievance on the basis of its "merits" (i.e., whether Mr. Noble's interpretation of the 1974 award was correct). Rather, both dealt with it on the basis of its consequences, and the way they perceived it would alter the existing situation for "dayworkers". It should also be noted that the company never did offer to the respondent an unconditional acceptance of Mr. Noble's grievance: the proposed settlement was predicated on the respondent explicitly accepting the full consequences outlined by the company in its letter of March 11th. Whether or not Mr. Noble was technically correct in his interpretation, it was the decision of the parties to the collective agreement not to place the question in the

hands of an arbitrator to be tested. Rather, the parties, by agreeing on the withdrawal of the grievance, accepted an interpretation of the collective agreement which was consistent with the *status quo*. Mr. Noble concedes the right of the two parties to the collective agreement to mutually agree to amend the collective agreement at any time, but argues that here *they failed to do so*. In response to that, the Board would observe that if one were to assume that Mr. Noble was "correct" in his interpretation of the existing contract language, then the company and the respondent were in effect agreeing by their handling of the grievance to treat that language as saying something different. Whether an "amendment" to the contract in that form would have the same force and effect in the future as a written revision is of no concern to the Board, for the purposes of the issue before us. Nor does the Board agree with the complainant's submission that in adopting the course it did, rather than procuring an actual amendment to the agreement, the respondent avoided the political "heat" which would have been generated by such a process. In both regards the Board notes that the respondent's executive, after weighing the interests that it had to, proceeded in a fashion that was fair and open. Far from abdicating any political responsibility for the course it considered advisable, the executive on its own initiative carried the matter to the scheduled membership meeting, fully explained its view, and made an unambiguous recommendation to the membership. Comparing what Mr. Noble stood to gain with what others stood to lose, the Board finds nothing implicitly arbitrary, discriminatory or in bad faith in the decision to elevate the interests of one group of employees over that of Mr. Noble.

9. In view of the foregoing, the Board finds no basis for intervening to set aside the action of the respondent in this matter, and the complaint is dismissed.

1525-80-OH United Electrical, Radio & Machine Workers of America, Local 524, Complainant, v. Canadian General Electric Company Limited, Respondent.

Health and Safety-Work suspended due to unsafe fumes-Incentive workers deprived of working-Whether basic hourly pay or average earnings payable for period of shutdown-Whether Act contravened

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *L. C. Arnold and J. Gooley for the applicant; E. T. McDermott, J. Denham and D. Turnover for the respondent.*

DECISION OF G. GAIL BRENT, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; June 16, 1981

1. The complainant has complained that the respondent has dealt with certain of its employees contrary to section 24 of *The Occupational Health and Safety Act*, 1978, S.O. 1978, c.83.

2. This matter was set down for hearing on November 20, 1980, but was adjourned *sine die* on the agreement that any hearing would be based on the statements of fact filed by each of the parties. These two statements therefore constitute the agreed facts upon which the Board is acting and they are set out in their entirety below:

STATEMENT OF FACTS
RE: COMPLAINT UNDER SECTION 24 OF
OCCUPATIONAL HEALTH AND SAFETY ACT

There is no conflict between the parties as to the conditions that led up to and justified the shutdown of the jobs in question because of unsafe conditions.

Due to the presence of fumes caused by trichloroethylene vapour in the welding environment of Unit 676, welding work was suspended by agreement of the parties five or six times a week, for short periods averaging three to four hours per week, in order to allow such fumes to subside.

Subsequent to the filing of the grievance by the employees concerned, the conditions giving rise to the suspension of work have been corrected.

The dispute between the parties brought before this Board for your determination involves the method of wage compensation for all periods of time involved in these shutdowns.

The employees involved are incentive employees who normally have earnings in excess of the hourly rate of pay for their classification. These employees, like all other incentive employees, have an average hourly earnings (A.H.E.) that is paid to them under various abnormal conditions of work.

For the periods of time involved in this dispute the Company paid these employees the hourly rate of pay for their job.

The Union contends that the grievors should have been paid their average hourly earnings (A.H.E.) for all time involved in the shutdown of work because of this unsafe condition.

This is the substance of the dispute on which the complaint is made and the Board is requested to make a determination.

COMPANY STATEMENT OF FACTS

1. The Company's operations at Park Street in Peterborough include an aluminum welding operation in Building 16A which is part of switchgear equipment and components. This complaint arises out of a grievance by 9 filter-welders working in the aluminum welding operations.

2. The Company has encountered air contamination problems in the aluminum welding area. The Company has taken a number of steps to try to rectify the situation including modifying, relocating and ultimately in several cases shutting down major equipment. The Company has also made other efforts to control the situation including; installing exhaust systems at various locations, including the welding area; installing other equipment; and installing a make up air ventilation system in Building 16A which brings fresh air in from outside the plant.

3. Pending a solution to the problem, the Company established an administrative control procedure to deal with the situation where the fumes became a source of irritation to the employees in the welding area. The situation may occur once a month or less or sometimes several times a week. The procedure is that where the employees notice any odour or experience any discomfort from the contaminants, one of two designated employees (the union steward and the working leader) will use a tester located in the welding area to test for air contamination. If the levels of contamination are approaching unacceptable levels the employees are under instructions to notify the foreman, to stop work and, if necessary, vacate the area. In the summer months, the employees may go outside or in the winter, they may go to another area of the plant. Fans are turned on and doors opened and the area clears up within 30 to 45 minutes as the air contaminants disperse relatively quickly. The employees have behaved in a responsible and cooperative manner in carrying out the administrative control procedure.

4. The employees are not assigned other work during this time although on rare occasions, they may have been given clean up tasks. Assigning alternative work would not be practicable in view of the short period of time involved nor was such alternative work available on this short term basis.

5. Once the foreman was advised of the situation by the employees assuming he was not in the area to notice the condition himself, he would call an employee from Manufacturing Engineering to do further testing to locate the source of the problem. On the afternoon shift when no foreman is on duty, the employees may not report to a foreman before leaving the area although they are expected to enter the results of their tests in a log.

6. The employees in question work on an incentive rate. When employees working on incentive are interrupted, for example, when they are assigned different tasks or when there is idle time while they wait for machinery or equipment, they are paid either their day rate or their average hourly earnings depending upon which provision of the collective agreement applies. Average hourly earnings (A.H.E.) is defined in Article 8.15 of the collective agreement as follows:

“2. Average Hourly Earnings (A.H.E.) — is the average of an incentive

employee's total earnings excluding overtime premium and night shift bonus. These earnings will be calculated as soon as possible after the end of each fiscal quarter and will be used during the following fiscal quarter whenever or wherever they are authorized."

Day rate means the starting rate, the job rate, (the rate for a fully qualified and experienced employee in a particular classification) or an approved rate in between.

7. The employees and the Union are claiming that for the period of time employees were not working and remained at a location nearby, they should be paid their average hourly earnings. It is the Company's position that the employees are entitled to their day rate in those circumstances.

8. The issue which the parties are asking this Board to determine is whether the employees ought to receive average hourly earnings or day rate for the brief time periods for which work stopped and the employees waited nearby while the air contaminants were dispersed from the welding area.

9. The following documents are submitted for this Board's consideration:

- (i) the grievance;
- (ii) the Company's replies;
- (iii) the collective agreement.

10. The Union has elected pursuant to section 24(2) of *The Occupational Health and Safety Act, 1978* to have this complaint heard by this Board instead of proceeding to arbitration on the grievance.

3. The provisions of section 24(1) of *The Occupational Health and Safety Act, 1978* are set out below:

24.(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

Subsection 3 of that section imparts into the section the provisions of section 79(4a) of *The Labour Relations Act*. Accordingly, we proceeded with the burden of proof on the respondent that it did not act contrary to *The Occupational Health and Safety Act, 1978*.

4. The facts as presented to us indicate that both parties agreed that under certain conditions work in an area would cease and employees would vacate that area until the fumes were cleared. Given the agreement of the parties, we may assume that the condition leading up to the temporary evacuation was considered to be unsafe and that, absent the agreement about evacuation, the employees exposed to the fumes would have been justified in refusing to work in the area while the air was so contaminated. The facts also indicate that the respondent treated the employees concerned as though they were on "lost or idle time over which the employee has no control" within the meaning of Article 8.10 of their collective agreement and paid them accordingly. The complainant is claiming that such a treatment penalizes the employees to the extent of the difference between what they were paid and what they could have earned on incentive rates over the period of idleness. The complainant further claims that such treatment is a disincentive to employees seeking enforcement of health and safety legislation and is therefore prohibited by the legislation. Nine employees were effected and idle time ranged anywhere from four hours per week to half an hour per month, depending on conditions.

5. There is no dispute that the respondent could have assigned some or all of these employees to alternate work and paid them according to the appropriate collective agreement rate which may not necessarily have been either the incentive rate or the A.H.E. claimed by the complainant. It is apparent from the agreed facts that no alternative assignments were made because the interruption was usually too short to make such arrangements practical.

6. The question for this Board to answer is whether the respondent has shown that it did not breach section 24(1)(c) (*supra*). Counsel for the respondent spent a considerable amount of time defining "penalty" for the Board and trying to convince us that there was no penalty imposed on the employees here. With respect to the arguments made by both counsel concerning the definition to be ascribed to "penalty", it is sufficient for these purposes to acknowledge that the payment of a smaller sum of money than that which the employee would otherwise be entitled to receive could be capable of being construed as a "penalty". The intent of section 24(1) was surely to prevent an employer from doing any act which would place an employee in a worse position than he would otherwise be in *because* the employee has sought compliance with the legislation. The two aspects of the subsection are inseparable and it would be wrong to overlook that aspect of the legislative prohibition.

7. In this case there can only be a "penalty" in any sense of the word if the employees were paid less than they would otherwise receive in the same situation. The respondent has interpreted its obligation to pay an analogous to its obligation under the "idle time" provisions of the collective agreement. If that is what the employees are entitled to receive under the collective agreement, then there is no "penalty" being imposed, unless the statute specifically overrides the collective agreement in that regard. If that is not what the employees are entitled to receive under the collective agreement and the respondent has erred in its interpretation of the collective agreement, then, depending on the sort of error made, there may be a "penalty" in fact; but if that "penalty" is not imposed "because the worker has acted in compliance with

this Act”, then there is no violation of the Act and the matter becomes one of contract interpretation only.

8. Having regard to the provisions of section 23 and specifically subsections 10 and 12 thereof, there is no specific provision which would prevent the respondent from treating this situation as being analogous to “idle time” within Article 8.10 of the collective agreement, provided that it does not thereby run afoul of section 24. In other words, it would appear that the Legislature was concerned lest an employer take action against an employee because of the employee’s refusal to work under the guise of an alternate work assignment or temporary layoff, etc. In other words, the Legislature determined that no employee could be singled out for special treatment if he sought enforcement of his rights. *Inco Metals Co.*, [1980] OLRB Rep. July 1981, appears to reinforce this reasoning because, there, employees were reimbursed for the compensation lost when they were sent home, and the Board noted that it was not “normal” for the company to send employees home while repairs were being affected.

9. In this case, these employees were being treated in the same manner as any other employee who would have “lost or idle time” due to circumstances beyond his control. Therefore, unless the very act of thus categorizing them was a “penalty” in the sense that it was done to put them in a worse position than they would otherwise be in, it is not obvious to this Board that the employees have been penalized.

10. In any event, the action taken by the respondent if it is a penalty, must be taken *because* the employees sought compliance with the Act. It is impossible to ignore the presence of “because” in section 24(1). That word demands that the Board find a motivating causal connection between the actions of the respondent and the actions of the employees. In other words, the Act prohibits the respondent from reacting to certain employee conduct by taking action detrimental to the employee’s interest. To paraphrase the Board’s jurisprudence in areas where an unfair labour practice is alleged in relation to conduct involving a particular employee, there must be an anti-safety animus involved. The Act does not prohibit the respondent from taking any action, free of such animus, which as a consequence causes loss to employees. For example, if an employee seeks to have the Act complied with, and the employer reacts to such attempts by taking action against the employee in whole or in part on account of his attempts, then section 24(1) has been violated. However, if an employee, in seeking to have the Act complied with, discloses a situation which is so unsafe that the employer must shut down for a period of time and, as a consequence of this shutdown, the employee suffers to the same extent as all the other employees, then he cannot complain that there has been a violation of section 24(1) because the employer is not reacting by taking action against him, but, rather, he is suffering as a natural consequence of the shutdown.

11. In this case there is absolutely no evidence to suggest that the respondent was in any way moved to take action against these employees because they sought compliance with the Act. The facts suggest a shared concern about the situation and an agreed upon procedure for removing employees from any potential risk to their health or safety. It seems inconsistent with such a concern to conclude that the respondent would adopt a particular method of calculating pay which was intended to harm employees because they wanted to have their workplace free of contaminating fumes. There is nothing to suggest that the method of payment chosen was chosen because the employees sought compliance with the Act.

12. As adverted to above, one argument put before the Board was that if the employees are paid less than they would have earned had they continued working at their incentive rates, then it must be concluded that a penalty has been imposed. It would seem that the test should be whether the employee was receiving less for safety-related idle time beyond his control than for non-safety-related idle time beyond his control. If that is not the test, then the natural result of the complainant's argument would be to conclude that whenever idle time was compensated at a different rate than non-idle time, there was a penalty to the employee. Such a conclusion is patently uncalled for and would mean that the parties themselves had agreed to a penalty clause of some sort in Article 8.10 of the collective agreement. Surely the parties intended only that the financial impact of a certain sort of idle time would be lessened in the case of incentive workers rather than that they should be penalized for idle time that resulted from matters beyond their control.

13. For all of the reasons set out above, the Board concludes that there was no violation of section 24(1)(c) of the Act either because there was no penalty imposed on the employees or because there was no penalty imposed on the employees because they acted in compliance with the Act.

14. The complaint is dismissed.

DECISION OF BOARD MEMBER M. J. FENWICK;

1. I dissent from the decision of my colleagues.

2. The instant case is one of the few that have come before this Board since the *Occupational Health and Safety Act, 1978*, came into effect. The Act now makes it more possible for employees to insist on a safe and healthy work environment.

3. The parties agree on the facts. They part company on payment to the incentive workers for work time lost because it was necessary to evacuate and air their welding department premises.

4. The company contends that it has made payment of day rate for idle time in keeping with Article 8.10 of the collective agreement. I do not agree that Article 8.10 covers matters concerning safe and healthy working conditions.

5. It is not disputed that the company attempted to cope with the air contamination. However, no permanent relief has been devised as yet.

6. It is incumbent on the employer to provide a safe and healthy work environment. It has been unable to do so in the welding department.

7. I would find that failure to pay employees affected their average hourly earning (A.H.E.) imposes a pecuniary penalty on the employees contrary to the spirit of the *Occupational Health and Safety Act, 1978*.

2292-80-U Suzanne Hebert-Vaillant, Complainant, v. Canadian Union of Public Employees Local 2327, Respondent.

Duty of Fair Representation-Section 79-Discharged employee requesting section 79 complaint be filed-Upon union refusal, filing complaint successfully on own behalf -Whether union considered request in perfunctory manner-Whether arbitrary-Board awarding costs of complainant filing own case

BEFORE: Ian Springate, Vice-Chairman

APPEARANCES: *J. B. West and J. M. Ames for the complainant; M. Hikl and S. Backs for the respondent.*

DECISION OF THE BOARD; June 5, 1981

1. This is a complaint under section 79 of *The Labour Relations Act* which alleges that the complainant, Mrs. Suzanne Hebert-Vaillant, has been dealt with by the respondent contrary to the provisions of section 60 of the Act.

2. Prior to the events giving rise to these proceedings, Mrs. Hebert-Vaillant had been employed by the Prescott and Russell County Roman Catholic Separate School Board ("the School Board") for some four years as a full-time attendance counsellor. On or about November 19, 1980, Mrs. Hebert-Vaillant was advised by the School Board that her job was being eliminated and as of January 1, 1981, she ceased working for the Board. When she was advised that her job was being eliminated, Mrs. Hebert-Vaillant sought the assistance of Mr. Backs, a national representative of the Canadian Union of Public Employees ("CUPE"). This complaint is based on the contention that Mr. Backs failed to adequately assist Mrs. Hebert-Vaillant, and that the respondent, through the actions of Mr. Backs, violated section 60 of the Act. Section 60 provides as follows:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

3. Mrs. Hebert-Vaillant is 34 years of age, and holds degrees from both Laval University and the University of Montreal. Prior to commencing work with the School Board, she had worked as an attendance counsellor in Shawinigan, Quebec, and had also done some social work in the field of child welfare.

4. Mrs. Hebert-Vaillant's work with the School Board involved acting as an attendance counsellor and also acting in the nature of a social worker with students who had attendance problems. Her competence in performing this work was never called into question. Mrs. Hebert-Vaillant's case load had shown a steady increase during the period of her employment with the School Board.

5. In September of 1979, a group of employees working in the School Board decided

to approach CUPE to have the union become their bargaining agent. Mrs. Hebert-Vaillant was asked by the employees to contact the union. Mrs. Hebert-Vaillant then made contact with Mr. Backs, a national representative of CUPE based in Cornwall. There then followed an organizing campaign among the employees. Mrs. Hebert-Vaillant was the prime mover behind the campaign, and signed-up a majority of the other employees into union membership.

6. On October 15, 1979, CUPE filed an application with this Board to be certified as the bargaining agent for certain of the School Board's employees. A certificate was issued to CUPE on November 13, 1979, for a bargaining unit which included Mrs. Hebert-Vaillant.

7. It should be noted that the application for certification was made in the name of CUPE and not in the name of any local of the union. The certificate was issued directly to CUPE. At some point in time, CUPE determined that the employees of the School Board should be grouped into Local 2327, which was apparently a newly-chartered Local. At a meeting held on November 26, 1979, Mrs. Hebert-Vaillant was elected president of the local.

8. Negotiations for a first collective agreement with the School Board commenced on January 25, 1980, and continued throughout most of the year. As president of the local Mrs. Hebert-Vaillant attended at all the negotiation meetings. On October 15 and 16, 1980, the employees engaged in a half-day strike against the School Board. Mrs. Hebert-Vaillant was the prime mover behind the strike, and she was quoted about the strike in the local newspapers. Mrs. Hebert-Vaillant also wrote to the local church authorities to put before them the position of the employees.

9. In November of 1980, the School Board put forward an offer on all outstanding items to the union and requested that it be put to the employees by way of a vote. In a vote held on November 10, 1980, the employees rejected the School Board's offer.

10. On November 19, 1980, the School Board, by way of letter, advised Mrs. Hebert-Vaillant that it had been studying its staffing requirements and had decided to abolish her position as of January 1, 1981, and further that the duties connected with her position would be taken over by the director of student services. Although the School Board at the same time announced certain other changes, such as abolishing a number of vacant positions, Mrs. Hebert-Vaillant was the only person whose employment status was put in jeopardy. It should be noted that at the same time that the School Board decided to abolish Mrs. Hebert-Vaillant's position it indicated that it had not fully completed its study of its staffing requirements. Mrs. Hebert-Vaillant discussed the School Board's letter to her with Mr. Backs on November 20, 1980.

11. Either on or shortly after November 20, the School Board put forth another proposal for a collective agreement. At a meeting held on November 24, 1980, the employees voted to accept the proposal. On or about December 4, 1980, a collective agreement was entered into with the School Board. Although CUPE had been certified as the employees' bargaining agent, the collective agreement was actually entered into by Local 2327. Presumably this action reflected a transfer of jurisdiction from CUPE to its Local 2327 as well as a voluntary recognition of this transfer on the part of the School Board. On or about the same day as the collective agreement was signed, Mrs. Hebert-Vaillant again discussed her situation with Mr. Backs. By this time Mrs. Hebert-Vaillant had begun to look into the legal

remedies which might assist here, and she raised with Mr. Backs the possibility of having the union file a complaint with the Board under section 79 of the Act alleging that she had been discharged because of her union activities.

12. Section 58 of *The Labour Relations Act* prohibits an employer from refusing to continue to employ a person because that person is a member of a trade union or is exercising any other rights under the Act. One such right is the right to participate in the lawful activities of a trade union. Complaints alleging a violation of section 58 can be made by the individual concerned, but almost invariably they are filed by a trade union as the complainant with the union asking for a remedy for the individual, who is referred to as "the grievor". Section 58 of the Act is aimed at protecting individuals from reprisals because of their involvement with a trade union. The right of trade unions to engage in lawful conduct free from improper employer interference is protected by section 56 of the Act. Improper employer conduct against an employee because of his union activities can amount to both a wrong against the employee under section 58, as well as a wrong against the trade union under section 56. Accordingly, it is common for trade unions to file a single complaint with the Board alleging that an employer has, by discharging an employee, violated both section 56 with respect to the union and section 58 with respect to the employee.

13. Complaints alleging a violation of section 56 and/or section 58 of the Act are filed with the Board pursuant to the provisions of section 79. If the Board determines that an employee has been terminated contrary to the provisions of the Act, it is given the authority under section 79(4)(c) to order that the employee be reinstated with compensation. Further, and of some import in these proceedings, is the fact that if a person has been discharged contrary to the Act, it is the employer which has the burden of proof to show that it did not act contrary to the Act. This reverse onus is created by section 79(4a) of the Act which states as follows:

79(4a) On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

14. On December 4, 1980, when Mrs. Hebert-Vaillant raised the possibility of the union filing a section 79 complaint with the Board, Mr. Backs' reply was that a section 79 complaint would be a lost cause since the School Board had the right to abolish her position and the union would be unable to prove that its actions were motivated by her union activities. In this regard, Mr. Backs noted that in the School Board's letter to Mrs. Hebert-Vaillant advising her that her position was being eliminated, there was no reference to her union activities. Mr. Backs recommended that instead of filing a complaint under section 79 of the Act, Mrs. Hebert-Vaillant should file a grievance under the grievance procedure set out in the collective agreement with the School Board.

15. On December 12, Mr. Backs and Mrs. Hebert-Vaillant met with representatives of the School Board to discuss both Mrs. Hebert-Vaillant's situation insofar as it was affected by the provision of the collective agreement and also the possibility that the union might file a

grievance under the agreement. At the meeting, Mr. Backs contended that the School Board's plan to use the director of student services to perform the work being done by Mrs. Hebert-Vaillant would involve the violation of a provision in the agreement prohibiting managerial personnel from performing bargaining unit work. Officials of the School Board agreed with this contention. At the meeting, Mr. Backs also put forward the proposition that under the terms of the collective agreement Mrs. Hebert-Vaillant had the right to "bump" an employee who had less seniority than she.

16. During the December 12th meeting, the representatives of the School Board proposed that Mrs. Hebert-Vaillant continue to do the same type of work as before, but as a "contract employee". It was apparently the understanding of all those at the meeting that under such an arrangement Mrs. Hebert-Vaillant would be outside the scope of the bargaining unit represented by the trade union. Because of this, Mrs. Hebert-Vaillant rejected the proposal.

17. On December 17, 1980, the School Board forwarded to Mrs. Hebert-Vaillant a letter advising her that no management person would be performing the duties of her attendance counsellor and also advising her of her right to bump a janitor who had less seniority than she. For Mrs. Hebert-Vaillant to have accepted this position would have resulted in a substantial cut in her salary, as well as have required her to perform duties of an entirely different nature than what she had been trained for and what she had been performing.

18. Mr. Backs strongly recommended that Mrs. Hebert-Vaillant accept the janitor's position. He advised Mrs. Hebert-Vaillant that while working in that position, she could have kept an eye on who was performing her work. At the hearing into this matter, Mr. Backs testified that in his view he had stopped the School Board from using the superintendent to perform the duties of the attendance counsellor, and that over time, the School Board would have to re-establish the attendance counsellor's position with Mrs. Hebert-Vaillant in it.

19. On December 19, 1980, Mrs. Hebert-Vaillant discussed her situation with Mr. Backs over the telephone. It is not disputed that during the conversation Mrs. Hebert-Vaillant advised Mr. Backs that she wanted the union to file a complaint under section 79 of the Act, and that she preferred to go under section 79 rather than take the janitorial job even if there was little chance of success. Mr. Backs' reply was that a section 79 complaint was "impossible" and that it would not produce any positive results.

20. On December 22, 1980, Mrs. Hebert-Vaillant met with a lawyer to discuss her situation. On the basis of this discussion, Mrs. Hebert-Vaillant decided to herself file a complaint under section 79 of the Act alleging that she had been terminated for union activity. Mrs. Hebert-Vaillant then retained counsel to act on her behalf.

21. On or about December 23, Mrs. Hebert-Vaillant contacted the other members of the executive of Local 2327 and advised them that she had retained a lawyer, and also indicated that she would be seeking the support of the Local. On December 29, 1980, Mrs. Hebert-Vaillant's counsel wrote to Mr. Backs to inform him of her decision to file a section 79 complaint and also to request that the union assist her financially. This letter was apparently not replied to by Mr. Backs. As of January 1, 1981, Mrs. Hebert-Vaillant ceased working for the School Board.

22. A meeting of the membership of Local 2327 was held on January 12, 1981. At the meeting a new executive was elected for the Local. The meeting then turned to discuss Mrs. Hebert-Vaillant's situation. During the meeting a motion was made that the Local pay Mrs. Hebert-Vaillant's legal fees. A number of the members of the Local objected on the basis that Mrs. Hebert-Vaillant had not gone through the grievance procedure, and also because of the costs involved. The motion was ultimately defeated in a split vote.

23. Mr. Backs was present at the January 12th membership meeting. In response to a question from one of the employees, Mr. Backs indicated that the CUPE national office "might" help with Mrs. Hebert-Vaillant's legal costs, but that he could not say for certain. During the meeting, Mr. Backs asked Mrs. Hebert-Vaillant if she would accept having CUPE's own lawyers take over the case. Mrs. Hebert-Vaillant replied that it would be acceptable to her provided it did not adversely effect her case. However, nothing further ever came of this proposal.

24. Mrs. Hebert-Vaillant continued with her section 79 complaint against the School Board, being represented throughout the proceedings by her own solicitor. Mrs. Hebert-Vaillant also filed this complaint alleging that by failing to more actively assist her, Local 2327 had violated section 60 of the Act. At the hearing into this complaint, counsel for Mrs. Hebert-Vaillant's challenged the union's handling of Mrs. Hebert-Vaillant's termination on a number of grounds, but primarily relied on the union's failure to file a section 79 complaint on her behalf.

25. Mr. Backs was called as a witness by the respondent. Mr. Backs testified that he had felt that a section 79 complaint would not likely be successful in that the School Board had been re-evaluating various positions and further that he had talked to other members of the executive of Local 2327 who had advised him that they did not think that Mrs. Hebert-Vaillant's position had been eliminated because of her union activity. Although Mr. Backs discussed the possible filing of a grievance with representatives of the School Board, at no point did he indicate that the union was considering filing a section 79 complaint on behalf of Mrs. Hebert-Vaillant and ask the School Board to justify its decision to eliminate her position. During the hearing in this matter, Mrs. Hebert-Vaillant stated that a number of teachers employed by the School Board had advised her that they thought the Board was out to "get her". Later, when giving his own testimony, Mr. Backs stated that at the relevant time he had been looking for this type of information, and that had Mrs. Hebert-Vaillant advised him of what she had been told by the teachers then he might have viewed a possible section 79 complaint in a different light.

26. This appears to be the first time that the Board has been faced with a complaint alleging that a union has violated section 60 of the Act by failing to file a section 79 complaint with the Board on behalf of an employee. I am satisfied, however, that the representation of employees in situations where a section 79 complaint might provide an employee with a remedy fall within the ambit of section 60. A bargaining unit employee who has lost his job because of an employer's violation of *The Labour Relations Act* is entitled to the same type of representation by a trade union as is an employee discharged contrary to the provisions of a collective agreement. Indeed, it is hard to imagine an employee who has a stronger claim to his union's assistance than an employee whom it appears may have been terminated because of his support for the union.

27. This is not to say that a trade union is under a legal obligation to file a section 79 complaint on behalf of every employee who feels he has been discharged or otherwise discriminated against by his employer because of his union activity. However, the union is under a duty to consider the advisability of doing so, and to do so in a manner that is not arbitrary, discriminatory or in bad faith. In the instant case, it is not alleged that Mr. Backs acted in bad faith or in a discriminatory manner. It is, however, contended on behalf of Mrs. Hebert-Vaillant that Mr. Backs acted arbitrarily in the sense that he failed to put his mind to the matters relevant to the possible success of a section 79 complaint.

28. A number of considerations are relevant to a union's determination as to whether the facts surrounding the termination of a union activist warrant the filing of a section 79 complaint. Among these is the fact that an employer is entitled to continue to manage its enterprise during both a union organizing campaign and negotiations for a first collective agreement. As long as the employer is not motivated by anti-union considerations, it is free to discharge an employee for disciplinary or other appropriate reasons and (subject to the restrictions set out in section 70 of the Act) to organize its work force, including increasing and decreasing staff, as required by financial and other operating considerations. On the other hand, however, when dealing with a section 79 complaint, it is the employer who must establish that its actions were not motivated by anti-union considerations. In addition to these considerations, a trade union must also put its mind to the particular facts surrounding the employee's termination. Absent any other considerations, an employer will generally have a greater "uphill battle" to demonstrate that its decision to terminate a union supporter was not motivated by improper considerations if the employee involved is a highly visible union activist as opposed to an employee who has not taken any leadership role in the union but has instead been only one of a large number of union supporters. Further, the claim that a union activist's position was eliminated for financial reasons will generally prove more convincing if there has been a general reduction in staff and the employer can point to some objective criteria which it used in deciding what positions would be eliminated, then the employer in a section 79 proceeding will generally have to come forward with very compelling and credible reasons for its actions.

29. In the instant case, it was Mrs. Hebert-Vaillant who made the initial employee contact with CUPE and it was Mrs. Hebert-Vaillant who was the prime mover during the organizing campaign. Mrs. Hebert Vaillant was subsequently elected the president of Local 2327, and it was she who led the employees out on a brief strike and put forward the union's position to the local press. Mrs. Hebert-Vaillant was the chief elected representative of the employees during a difficult set of negotiations for a first agreement. The decision to abolish her position was made shortly after the employees rejected an offer put forward by the School Board as a possible final settlement. Although the School Board has been conducting a study of various positions, the entire study was not yet completed and further Mrs. Hebert-Vaillant was the only employee directly affected by the changes announced in November of 1980. In addition, the School Board indicated that it was prepared to have Mrs. Hebert-Vaillant continue performing her duties but only as a "contract employee" outside the bargaining unit.

30. The facts in this case should have caused the union to actively consider the filing of a section 79 complaint, particularly since the grievance procedure appeared not to provide Mrs. Hebert-Vaillant with any direct remedy. The union would have been justified in not filing a section 79 complaint if a careful investigation had convinced it that the School Board did, in fact, have a legitimate reason for its decision to eliminate Mrs. Hebert-Vaillant's position

untainted by anti-union considerations. Mr. Backs, however, decided that a section 79 complaint would be a waste of time without first conducting any meaningful investigation of his own or asking the School Board to provide him with the data which might have justified its decision. Instead, Mr. Backs relied primarily on the opinions of other employees to the effect that Mrs. Hebert-Vaillant's union activity was not what motivated the School Board, opinions which by themselves would have had no bearing on the outcome of any section 79 proceedings before the Board. Similarly, the opinion of teachers as to whether or not they felt the School Board had been out to "get" Mrs. Hebert-Vaillant could not have affected any section 79 proceedings.

31. I am satisfied that at no time did Mr. Backs put his mind to the various considerations relevant to deciding whether or not a section 79 complaint should be filed. Accordingly, I must conclude that Mr. Backs was not in any position to make a reasoned decision as to whether such a complaint should be filed by the union. In my view, Mr. Backs' consideration of the matter was so superficial and so perfunctory as to amount to conduct which can only be classified as arbitrary and as such it amounted to conduct which was in violation of section 60 of the Act.

32. Mr. Backs is a national representative for CUPE, and has no official position with Local 2327 which is the named respondent in this matter. Mr. Backs was, however, involved in the organization of the School Board's employees and indeed it was he who signed CUPE's application for certification. Mr. Backs was actively involved in the negotiations for a collective agreement. When Mrs. Hebert-Vaillant was advised of her impending termination CUPE was still the legal bargaining agent for the School Board's employees. Mr. Backs remained involved with the affairs of Local 2327 after the collective agreement was signed and the bargaining rights transferred to Local 2327. When Mrs. Hebert-Vaillant approached Mr. Backs about the possibility of filing a section 79 complaint, Mr. Backs did not indicate that he was not the individual Mrs. Hebert-Vaillant should be dealing with or that she should discuss the matter with someone in the Local. Indeed since this was a new local comprised of newly-organized employees, it is doubtful Mrs. Hebert-Vaillant could have meaningfully discussed her situation with anyone but Mr. Backs. Local 2327 was represented in these proceedings by Mr. Backs and a senior official of CUPE. At the hearing it was not contended that in dealing with Mrs. Hebert-Vaillant about a possible section 79 complaint, Mr. Backs was not acting on behalf of Local 2327. In all these circumstances I am satisfied that at the relevant time Mr. Backs was acting on behalf of the Local and that accordingly his actions must be deemed to be the actions of the respondent Local.

33. The remedy requested at the hearing in this matter was that the respondent be required to pay Mrs. Hebert-Vaillant's legal costs in filing and pursuing her section 79 complaint before the Board. At the hearing, the representative of the respondent union objected to paying Mrs. Hebert-Vaillant's legal fees on the basis that she had retained legal counsel without first advising the union of her intention to do so and without seeking the consent of the union. While it is true that Mrs. Hebert-Vaillant did retain legal counsel on her own initiative, it must be remembered that she did so only after she had told Mr. Backs that she wanted the union to file a section 79 complaint on her behalf and Mr. Backs had advised her that the union would not do so. Had the union either agreed to pay Mrs. Hebert-Vaillant's legal costs or arranged to have the union's own lawyers take over the section 79 proceedings as Mrs. Hebert-Vaillant indicated she was willing to have happen, then the union would have rectified the results of its earlier violation of section 60. Because the union failed to do so, Mrs.

Hebert-Vaillant was required to incur the legal costs associated with a section 79 proceeding before the Board.

34. It is of interest to note that subsequent to the hearing in this matter, a three-man panel of the Board issued a unanimous decision with respect to the section 79 complaint filed by Mrs. Hebert-Vaillant against the School Board. In its decision, the Board concluded that Mrs. Hebert-Vaillant had been terminated by the School Board in contravention of section 58 of the Act and directed that the School Board re-instate her to her former position with compensation for all lost wages and benefits with interest on the amount.

35. Having regard to the reasoning set out above, the respondent is directed to compensate Mrs. Hebert-Vaillant for her reasonable costs associated with filing and pursuing her complaint against the School Board. The Board will remain seized of the matter in the event the parties are unable to agree upon the amount of compensation involved.

0225-81-U International Beverage Dispensers and Bartenders Union, Local 280, Complainant, v. Cloverleaf Hotel, Division of MIB Holdings Ltd., Respondent.

Change in Working Conditions-Employee having privilege of not working Saturdays-Privilege withdrawn during statutory freeze period and employee discharged for not working Saturday-Whether contravening Act

BEFORE: Roy F. Egan, Vice-Chairman, and Board Members B. L. Armstrong and J. A. Ronson.

APPEARANCES: *Elizabeth McIntyre for the complainant; Lawrence S. Crackower, Q.C. and Tom Gorsky for the respondent.*

DECISION OF THE BOARD; June 30, 1981

1. This is a complaint under section 79 of *The Labour Relations Act* in which the complainant alleges that the respondent dealt with Susan Hargreaves in a manner contrary to the provisions of sections 58, 61 and 70 of the Act. The complainant seeks the reinstatement in employment of Hargreaves with compensation for earnings lost as the result of the termination of her employment with the respondent.

2. There was no evidence before the Board to support the allegation that the respondent company had violated the provisions of sections 58 or 61 of the Act and the complaint, insofar as it relates to these sections, is dismissed.

3. Section 70 of the Act provides as follows:

70.-(1) Where notice has been given under section 13 or section 45 and

no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 13, in which case subsection 1 applies; or

(b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

The evidence establishes that the complainant applied for certification on January 29, 1981, and was certified by the Board on February 23, 1981. Notice to bargain was given on March 22, 1981. No collective agreement has been made between the complainant and the respondent. The complainant alleges that the breach of section 70 arose on March 7, 1981 and there was no dispute that the matter complained of occurred during the "freeze period" contemplated by the section.

4. The specific charge of the complainant is that on March 7, 1981, the respondent altered a privilege hitherto enjoyed by Hargreaves without the consent of the complainant union.

5. The privilege claimed by Hargreaves is that since 1970, while employed as a waitress

at the premises known as Cloverleaf Hotel, she had been excused the requirement to work on Saturdays as other employees did, and that she had continuously enjoyed that privilege even after a change of management, which occurred in or about October 1980 when the present respondent became owners. The custom of excusing Hargreaves from working on Saturdays, we find on the evidence, was continued by the respondent up until March 7, 1981.

6. Hargreaves testified that when she was first scheduled to work on a couple of Saturdays she brought to the attention of management the fact that she did not work on Saturdays and that she was told the matter would be looked after. She did not work the Saturdays and apparently a substitute was found. However, on April 24th Hargreaves was given the following letter:

MIRIAM (SUE) HARGREAVES

It has been brought to my attention that on the past Saturdays, namely April 4, April 11 and April 18, 1981 you were not at work although you were scheduled to do so. Your explanation was that "I don't work on Saturdays".

You have been scheduled to work this Saturday April 25th. Refusal to work this Saturday or any of your other future scheduled days *with out* full justification will leave us no choice but to terminate your employment with the Cloverleaf Hotel at once.

Yours truly,

CLOVERLEAF HOTEL
"M. Bergmann"
M.A. Bergmann

She did not work on April 25th, the Saturday following the receipt of the above letter. She gave as her reason the fact that she did not work on Saturdays. Hargreaves then received the following letter of termination dated April 29, 1981:

MIRIAM (SUE) HARGREAVES.

In regards to our letter of April 24th/81, we found that you again refused to work on your assigned shift, Saturday, April 25th/81, without any explanation. This negative attitude leaves us with no choice but to terminate your employment with the Cloverleaf Hotel at once as forewarned in our earlier letter.

Please find enclosed your Final Pay, Holiday Pay and Separation Slip.

Yours truly,

CLOVERLEAF HOTEL Div.
Div. M.I.B. HOLDINGS LTD.
M. Bergmann
General Manager

7. We find that since 1970, Hargreaves enjoyed a personal privilege absolving her from the normal requirement to work Saturday shifts. We further find that the enjoyment of this privilege continued after the change in ownership in or about October 1980 and that it constitutes a privilege within the meaning of section 70 of *The Labour Relations Act*.

8. We further find that the respondent, in altering Hargreaves' privilege without the consent of the trade union, and in discharging Hargreaves in furtherance of its illicit purpose, has violated section 70 of the Act, since its actions occurred within the period during which such conduct is prohibited by that section.

9. The Board therefore orders:

- (1) that Hargreaves be reinstated by the respondent forthwith;
 - (2) that Hargreaves be fully compensated by the respondent for all lost earnings and benefits sustained as a result of the actions of the respondent;
 - (3) that the respondent pay interest on the compensation for the lost earnings, such interest to be calculated in the manner described in *Hallowell House*, [1980] OLRB Rep. Jan. 35;
 - (4) that the respondent restore the working conditions of Hargreaves to those existing prior to the certification of the complainant; and, further,
 - (5) that the respondent post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.
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Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE COMPLAINANT PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY DISCHARGING SUSAN HARGREAVES.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL
ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL OFFER TO REINSTATE SUSAN HARGREAVES.

WE WILL PAY SUSAN HARGREAVES FOR ANY EARNINGS THAT SHE LOST
AS A RESULT OF HER DISCHARGE, PLUS INTEREST.

CLOVERLEAF HOTEL, DIVISION OF M. I. B. HOLDINGS LTD.

PER _____
AUTHORIZED REPRESENTATIVE

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 30TH day of JUNE, 1981.

door. Q. You observed them there? A. Yes, but I didn't see anything different about their walking... Q. You did not what? A. They had three steps to go up, and I didn't notice them waver or anything. Q. They got in a the side door? A. Yes. Q. What time of the day was that? A. I cannot say the time of day—it was night, while it was dark. Q. And did you see them again that evening? A. I saw them when they came out. Q. What time? A. Twenty minutes afterwards, or half an hour. I would not say definitely. Q. How did they proceed when they came out of the hotel and went to the car? A. I did not see them when they went to the car, and I did not know which was the driver, or who got in this side or that. I was not interested, I was just casually looking out. Q. How did they walk? A. All right, as far as I know. Q. How do you mean? A. As far as I could see... Q. Did you have any difficulty seeing them? A. No, I was looking through the window, and it was about 40 feet away... Q. Was there any conversation between you and your grandson in reference to these men? A. I suggested... Q. Just answer the question. Was there any conversation. Do not tell me what the conversation was. A. No, no. I don't remember any conversation about them. We were talking about other things. Q. Was anything said, at any time, by you to your grandson about these men? I am not asking you what was said, but was anything said? A. I don't remember that. I don't remember. Q. In what manner did the driver proceed in the car, after getting into it and driving off? A. From what I could see he drove up the street and turned north. Q. Did you observe anything particular about the manner they drove? A. No... Q. Did you see them turn to go north. A. Yes. Q. How long was it before you received this telephone message that you saw them proceed in that direction? A. I would judge about 15 to 20 minutes, maybe a bit longer.

While one can glean a hint of reticence from the above, one cannot appreciate the position counsel for the plaintiff found himself in until one is made aware that Dr. MacIntosh gave the following statement to the Sheriff prior to the trial:

MR. HEWITT: ... I have information as to what Dr. MacIntosh saw. I have a statement in which he describes ... HIS LORDSHIP: Indicate to me, so that I can judge the materiality of it... (Mr. Hewitt brings the statement into Chambers). MR. HEWITT: My lord, if I may paraphrase it, he was sitting in the room looking outside, he saw car, he saw it stop and a man get out of the car, looked intoxicated, staggered, made his way to the hotel. The wall used for support to get to the hotel door. Tried the other door facing my house, couldn't get in, went to the front door, supporting on the wall of the hotel. Remained an hour or so and came out staggering towards the car. HIS LORDSHIP: I think that is sufficient for the purpose of this warrant..

Counsel for the plaintiff made application to the Trial Judge for leave to cross-examine the witness MacIntosh (as well as a second witness), and to introduce under section 24 of *The Evidence Act* (then section 20), the prior inconsistent statement. The learned Judge adopted the view that “adverse” in section 24 meant “hostile”, and refused the application on the

ground that the witnesses did not by their manner and demeanour in the witness box show hostility.

5. On appeal, Porter, C.J.O., began his analysis by noting that the authorities in this area differed, but that the weight of English and Canadian authority tended to support a construction which would render “adverse” as the equivalent of “hostile” in the sense of showing a hostile mind. As the learned Chief Justice was to note in the succeeding case of *Boland v. The Globe & Mail*, *supra*, at page 720:

... There was authority which indicated that “adverse”, meant “hostile”, in the sense of a *hostile mind* towards the party producing him, and that such hostility could be determined only by the demeanour of the witness and his manner of giving evidence.

Porter, C.J.O., in *Wawanesa* went on the state:

... I deem it to be my duty to consider the authorities afresh with a view to decide whether this or some other construction of the statute should be followed in Ontario.

The dissenting decision of Roach, J.A. in *Wawanesa* proceeds entirely on the basis that “adverse” means nothing different from “hostile”. The majority, however, concluded the opposite at page 505:

... If it had been intended that a witness must be shown to be hostile in mind before the statement could be admitted, the statute could have said so. The word “adverse” is a more comprehensive expression than “hostile”. It includes the concept of hostility of mind, but also includes what may be merely opposed in interest or unfavourable in the sense of opposition in position.

Schroeder, J.A., who wrote the majority decision in *Boland*, concurs with the majority conclusion in *Wawanesa* on precisely the same ground (see page 733 in *Boland*). Porter, C.J.O., then summarized his conclusion in *Wawanesa* as follows:

I am of the opinion that s.24 of the *Evidence Act* covers the whole field of prior inconsistent statements made by a witness of a party producing him. It embraces inconsistent prior statements made by a hostile witness, and by one who though not hostile is unfavourable in the sense of assuming by his testimony a position opposite to that of the party calling him.

6. The words “by his testimony” in the quote above suggests that the declaration of “adverseness” precedes any consideration of the alleged inconsistent statement, as does a first reading of the remarks of the learned Chief Justice at the bottom of page 502.

The statute places upon the Judge the duty, first, to form an opinion as to whether the witness “proves adverse”. If he is of the opinion that the witness has proven adverse, the circumstances of the proposed statement

sufficient to designate the particular sufficient to designate the particular occasions shall be mentioned to the witness, and the witness must be asked whether or not he did make such statement. Finally, and only after this is done, the Judge may in his discretion, allow proof that the witness made such statement.

His full meaning, however, can be gleaned from his comments in *Boland*, at page 720.

Since the trial of this action, the whole question of such prior inconsistent statements has been reviewed by this Court in the *Wawanese Mutual Inc. Co. v. Hanes* 28 D.L.R. (2d) 386, [1961] O.R. 495. By that decision the word “adverse” was held not to be restricted to the case where a witness was “hostile” but to include any case where the witness by his testimony assumes a position opposite to that of the party calling him, *and is shown to have made a former inconsistent statement*. If the Judge forms such an opinion, he then may in his discretion, allow the statement to be put to the witness, and if the witness does not admit that he made it, to allow proof that he did make it. The Judge, however, in considering whether he should admit the statement, should consider its relevancy and importance, and should satisfy himself that the two statements are inconsistent with one another. There is wide discretion given to the Judge by the section. (emphasis added)

as well as from the following passage in *Wawanese* itself:

In cases where application is made to introduce a prior inconsistent statement under the Act, the Judge should, to determine whether a witness is adverse, consider the testimony of the witness, and the statement, and satisfy himself upon any relevant material presented to him that the witness made the statement. He should consider the relative importance of the statement, and whether it is substantially inconsistent. I think the Judge is entitled to consider all the surrounding circumstances that may assist him in forming his opinion as to whether the witness is adverse. It would be proper and the safer course, if such an enquiry becomes necessary, to conduct it in the absence of the jury, if the case is being tried by a jury. If after due enquiry the Judge is satisfied that the witness is adverse, he may consider whether under all the circumstances, and bearing in mind the possible dangers of admitting such a statement, the ends of justice would be best attained by admitting it. The section does not contemplate the indiscriminate admission of statements of this kind.

The Court, therefore, is distinguishing between the Trial Judge having the statement before him so that he may consider its effect, and whether he should then “admit” it, in the sense, normally, of allowing it to be proved in front of the jury. Since the Labour Relations Board functions, to date, without the use of juries, this distinction would appear to have little weight for the purposes of proceedings before our own tribunal. Rather than conducting a redundant *voir dire*, it may be more appropriate for the Board to request counsel to state the particulars of the prior inconsistent statement on which he relies, so that the Board may make an

assessment of its potential effect prior to the hearing being side-tracked by actual proof of the statement. This, however, is simply a matter of procedure to be determined by the Board in the exercise of its discretion in each particular case. What *is* clear, is that the Board must in some way have the alleged prior inconsistent statement before it prior to ruling that a witness has *not* proven adverse, so that the proffering party is never deprived of the opportunity to have the Board consider the impact of the statement itself in its deliberations. As the Court noted in *Boland*, at page 734, on the procedure for finding “adverseness”:

It is utterly improbable that the witness’ testimony would have been offered if it had been anticipated that his evidence would have taken an untoward turn, and adverseness in a witness generally presents itself to the party who called him as a highly astonishing and unexpected development. The fact that the witness who is alleged to have proven adverse made at some other time a statement at variance with his testimony then under consideration is in the highest degree material to the subsidiary issue thus raised and, indeed, I cannot think of any single factor or piece of evidence that would be more competent as an aid in its determination. Whether it should be held that a witness has or has not proven adverse must depend upon the circumstances of each particular case.

Once the Board itself “admits” the evidence, of course, nothing further turns on a declaration of “adverseness”, since the only effect of that finding is to legitimize the introduction into evidence of the prior inconsistent statement. This anomaly appears simply to reflect the fact that the language of section 24 (as well, as noted, of the learned Justices) contemplates trials of juries, and true *voir dire*s.

7. To put the matter in perspective, consider the situation which arose in *Wawanesa*. It is questionable whether one could have discerned even “adverseness” from the evidence which Dr. MacIntosh was giving at the trial, particularly where the witness remained calm and courteous. But when one adds to the evidence the knowledge of Dr. MacIntosh’s prior inconsistent statement, the witness’ “adverseness” becomes readily apparent. In *Boland* the learned Trial Judge fell into the same error as occurred in *Wawanesa*, and the Court of Appeal

...The learned Judge’s failure to receive and consider this evidence *before deciding whether to grant or withhold the leave sought* by the plaintiff was error in relation to a matter of substance which is sufficient in itself to justify an appellate Court in reviewing the exercise of the trial Judge’s discretion. (emphasis added)

As MacKay, J.A., commented in *Wawanesa*, at pages 529 and 534:

... I think there is support in many of the decisions I have referred to for the proposition that it is in the interests of justice that where a witness has previously made a statement in regard to the matters in issue at a trial that is inconsistent with his testimony in the witness-box, that that fact should

be made known to the trial tribunal in order that proper weight may be given to the evidence.

...

The only purpose of a trial, in so far as the facts of a case are concerned, is to ascertain the truth and it seems to me that this purpose might well be defeated if a party were not permitted to show that a witness called by him in good faith, on reliance of the witness' previous statement, has told a story in the witness-box inconsistent with his previous statement in respect of the same facts. In such case it is of the utmost importance, in the interests of justice, that such a witness should be compelled to explain his change of story.

8. This demonstrates the policy basis for establishing the lesser test of "adverseness" for the introduction of a prior inconsistent statement, as opposed to "hostility". As Porter, C.J.O., pointed out in *Wawanesa*, at page 505, hostility is a form of adverseness; but it is not synonymous with that word. It is a higher form of adverseness (just as "gross negligence" is a higher form of "negligence"). And it is only a finding of *hostility* which will permit the full cross-examination ultimately sought by the applicant in the present case. MacKay, J.A., succinctly sums up in *Wawanesa*, at page 528, the full law of evidence governing this area, and it is useful to reproduce his comments here:

It is to be observed that the only right given by s.[24] is, if the witness proves adverse, with leave of the Judge, to prove that the witness made at other times a statement inconsistent with his present testimony. There is nothing in the section as to cross-examination and the section does not come into operation unless there is evidence to prove a prior inconsistent statement. There is, I think, no question that if a witness proves hostile and is so declared by the Judge, counsel may cross-examine the witness generally as to the matters in issue in the manner stated by Cross, including cross-examination as to any prior inconsistent statements, whereas on an application made under s.[24] of the *Evidence Act*, the only right that can be given is to prove the prior inconsistent statement after having drawn to the attention of the witness the statement and the circumstances of the making of it and asking him whether he had in fact made it. If he admits having made it, that admission supplies the proof, and the calling of witnesses to prove the making of it would be unnecessary, but unquestionably he could be questioned in regard to whether the prior statement was true and if he admitted its truth it would be evidence to be considered in the case. If he denies its truth but admits having made it, or if he does not admit having made it and it is proved by other witnesses that he did, then it goes only to the credibility of the witness.

9. The applicant, therefore, must satisfy the Board that its witness is "hostile" if it is to have full rights of cross-examination. In *Reference re R. v. Coffin*, [1956] S.C.R.191, at page 213, Kellock, J. defined "hostile" as "not giving her evidence fairly and with a desire to tell the truth because of a hostile animus toward the [party who called her]." The next question, then, may be stated in the dissenting words of Roach, J.A., in *Wawanesa*, at page 517:

The next question is,—How is hostility determined? Until that question cropped up in this case I did not think there was any doubt as to how it would be determined. It would be determined, so I thought and still think, by the Judge observing the witness as he gave his evidence in the witness-box, his demeanour and his general attitude and the substance of his evidence.

Whether evidence of a prior inconsistent statement could be added to the list of factors has long been a matter of judicial debate. As Grove, J. said, for example, in the 1886 case of *Rice v. Howard*, 16 Q.B.D. 681, at 684:

It would be a very nice question, and one upon which I should entertain great doubt, whether the judge, where there is nothing in the witness' demeanour to show that he is hostile, ought to receive extraneous evidence of the kind tendered in the present case for the purpose of determining whether he is hostile or not.

The majority of the Court in *Wawanesa*, however, disagreed with Grove, J. and Roach, J.A., and affirmed the view that the trier of fact may apply evidence of a prior inconsistent statement as part of the material to establish that a witness is hostile.

10. The Board, in summary, reaffirms the procedure it follows in dealing with allegations of prior inconsistent statements by a party's own witness, as outlined in *F.G. Bradley Co.*, [1973] OLRB Rep. June 342, at paragraph 9:

...The Board upon a motion made pursuant to section 24 of *The Evidence Act*, will permit counsel to adduce evidence of prior statements allegedly made by his witness which are inconsistent with the testimony of such witness as adduced during the course of the hearing, provided that these statements are put to the witness and the witness denies making them. Counsel's inquiry in this regard will be restricted generally to questions relating to the circumstances surrounding the making of the alleged inconsistent statements and he will not be permitted to cross-examine his witness on extraneous matters. Of course, if the witness admits the statement, that ends the matter. Assuming, however, that the statements are denied, counsel will then be permitted to introduce evidence to show that such alleged statements were in fact made. At the conclusion of such evidence, the Board must then decide as to whether on the balance of probabilities the alleged prior inconsistent statements were in fact made. If the Board is satisfied on the basis of all of the evidence that the statements were made, then normally counsel will be permitted to cross-examine the witnesses on the basis that the witness is "adverse" or "hostile".

The only portion of the above passage which now might be clarified is the final sentence. The use of the term "adverse" in the last line in conjunction with the word "hostile" (as in the Ontario Court of Appeal case of *R. v. Cooper*, [1970] 2 O.R. 54) makes it clear that "adverse" is being used in connection with rights of cross-examination only in its stronger sense of being actually "hostile", in accordance with the foregoing summary of the case law. To avoid any

confusion in future, one might be better not to use the term “adverse” at all when speaking of full rights of cross-examination, since that word appears only within the context of section 24 of *The Evidence Act*, which, as MacKay, J.A. pointed out, has nothing to do with the matter of cross-examination at large. On the other hand, the finding of a prior inconsistent statement might well, depending on its seriousness and relevance, and the likelihood of a mere lapse in memory, be sufficient in itself to cause the Board to declare the witness “hostile” for the purpose of cross-examination (see, e.g. *R. v. Hunter*, [1956] V.L.R. 31, quoted with approval by the majority in *Wawanesa*), in which case the concepts of “adverseness” and “hostility” do in fact merge. Whether this will “normally” be the result, however, remains to be determined on a case-by-case assessment.

11. The end result of this interim decision, therefore, is that the applicant will be permitted to place its alleged prior inconsistent statement before the Board if it chooses, and if the Board ultimately determines that the statement was made, the applicant may use that as a factor in persuading the Board to declare the witness Merrifield to be hostile. From that declaration would then flow the applicant’s sought-after right to cross-examine Mr. Merrifield at large.

0996-80-M; 1911-80-M Ontario Allied Construction Trades Council, and International Union of Operating Engineers, Local 793 and its Members, Applicant, v. **The Electrical Power Systems Construction Association** and O'Brien Contracting Inc., Respondent.

Evidence-Section 112a-Whether agreement containing patent or latent ambiguity-Whether Board hearing extrinsic evidence

BEFORE: D. E. Franks, Vice-Chairman, and Board Members H. J. F. Ade and H. Kobryn.

APPEARANCES: *S. B. D. Wahl for the applicant; H. A. Beresford for the respondents.*

DECISION OF THE BOARD; June 3, 1981

1. These two matters are grievances referred for arbitration by the Labour Relations Board under section 112a of *The Labour Relations Act*. Both grievances involve the same parties and essentially the same grievance, they simply relate to two different Ontario Hydro projects. As a consequence, at the hearing in this matter both referrals were consolidated.

2. The original grievance in this matter was filed under Article 29.3 of the master portion of the collective agreement between The Electrical Power Systems Construction Association (hereinafter referred to as "EPSA") and the Ontario Allied Construction Trades Council (hereinafter referred to as the "Allied Council"). The grievance filed alleges a violation of Article 6 of the Operating Engineers Appendix of the EPSCA Allied Council agreement. For convenience, we shall refer to the agreement between EPSCA and the Allied Council as the master agreement and to that portion of the agreement relating to the Operating Engineers as the Operating Engineers Appendix. Article 6 of the Operating Engineers Appendix refers to benefits and in turn refers to the wage schedules attached to the Appendix. The wage schedule in turn refers to specific welfare, pension and supplementary unemployment benefits. The other part of this grievance relates to Article 12 which refers to the wage schedule attached to the Appendix. The substance of this grievance is not that the employer has not made any such benefit payments, but rather that the employer has paid them in the wrong amounts. Thus, the parties are agreed that the respondent O'Brien Contracting Inc. has made payments to the appropriate funds for employees working on both the Bruce and Darlington generating projects. They are further agreed that the amounts paid by O'Brien are in accordance with the collective agreement relating to Bruce Evans Limited which provides for substantially less welfare and pension payments and for no payment at all concerning training funds. It is this difference in amounts that gives rise to the present dispute.

3. This grievance arises under an exceedingly complex set of collective bargaining arrangements. The Electrical Power Systems Construction Association bargains on behalf of Ontario Hydro and other contractors with a group of construction trade unions known as the Ontario Allied Construction Trades Council. They are parties to a collective agreement which runs from May 1, 1974 to April 30, 1984 and that agreement covers work in the province of Ontario on Ontario Hydro projects. Thus, for instance, although the Operating Engineers, Local 793 the applicant in the present case, is not party to a collective agreement with O'Brien Contracting Inc., there is no dispute between the parties that this collective agreement applied to O'Brien for work performed on Ontario Hydro projects. The collective agreement between

EPSCA and the Allied Council consists basically of a master portion and that master portion allows the negotiation of various trade appendices. The International Union of Operating Engineers is a member of the Allied Council and, in accordance with the master agreement, EPSCA and the Allied Council have negotiated an appendix for Operating Engineers. That appendix has from time to time been amended and an amendment was made effective May 1, 1980 which results in the Operating Engineers Appendix with which we are concerned in the present matter. Generally the appendix deals with the overall terms concerning the employment of operating engineers on Hydro projects. The appendix itself, however, does not deal with wages and, indeed, the evidence is that wages are not negotiated at the time such appendices are negotiated. The wage rates are in fact set out in various wage schedules attached to the appendix. There is a wage schedule for each of the various generating projects in which Ontario Hydro is involved and that wage schedule simply "picks up" the wage rate corresponding to that contained in the provincial agreement relating to the industrial, commercial and institutional sector of the construction industry. There is no doubt, however, that the wage schedules form part of the Operating Engineers Appendix which in turn is part of the agreement between EPSCA and the Allied Council.

4. The present dispute arises out of the language of the preamble to Operating Engineers Appendix, that preamble reads as follows:

"As provided in the 'Appendices' article of the master portion of the Collective Agreement, EPSCA and the Council have agreed to the following conditions to apply to employees in classifications covered by this Appendix, subject of the following:

The 'Wages', 'Shift Differential Rate' and 'Overtime Rates' articles of this Appendix and the 'Hours of Work' article of the master portion of this Agreement do not apply for driveway and parking lot construction and landscaping. When such work is undertaken, the wages, weekly hours of work, shift differential rate and overtime rates appropriate for the class and character of work shall be as established by the nearest influencing representative agreements between Local 793 of the Union and builders' exchanges, contractors' associations or contractors."

It is agreed by the parties that the "nearest influencing representative agreement" affecting landscaping is the Bruce S. Evans Limited agreement (hereinafter referred to as the "Evans Agreement"). The Evans agreement is a collective agreement between Bruce S. Evans Limited and the International Union of Operating Engineers, Local 793 and Labourers' International Union of North America, Local 183. Its term is from May 1, 1980 to April 30, 1982. It is not an agreement by a council of trade unions, but rather a single document which creates a collective agreement for both of the unions. We will be referring to its contents in some detail later in this decision.

5. The argument by the grievor in support of the grievance is quite simple. The preamble to the Operating Engineers Appendix refers specifically to "wages", "shift differential rate", "overtime rates" and "hours of work". By that preamble, it is only these specific articles of the Operating Engineers Appendix which are varied by the "nearest influencing representative agreement", i.e., the Evans agreement. Indeed, the terms wages, shift differential rate, and overtime rate are headings of specific articles in that appendix,

namely, Article 2, Article 4, and Article 5. The grievor thus argues that other articles and, in particular, Article 6 relating to benefits and Article 12 relating to apprenticeship and training programs, are not specifically, referred to in the preamble and are thus not modified by the nearest influencing representative agreement for landscaping. Article 6 referring to benefits, refers to the welfare, pension and supplementary unemployment benefits set forth in the wage schedules attached to the appendix. Similarly, Article 12 refers to training fund amounts also set forth in the wage schedules attached to the appendix. The grievor thus argues that the respondent O'Brien ought to pay the benefits and training fund amounts set out in the appropriate wage schedules attached to the Operating Engineers Appendix rather than the amounts set out in the Evans agreement, which is in fact what O'Brien has been paying.

6. The respondents take the position that the collective agreement binding O'Brien contains a latent or patent ambiguity and urged the Board to hear extrinsic evidence as to the intention of the parties and as witnessed by the manner in which the parties have interpreted the Operating Engineers Appendix in the past. The grievors denied that there was any ambiguity. The Board reserved its decision on the matter of ambiguity and heard evidence concerning the interpretation given to the documents by the parties.

7. After careful consideration of the collective agreement upon which the grievance is based, we are of the view that that agreement does contain a patent ambiguity. Simply put, we are of the view that when one tries to apply the Evans agreement to the portions of the Operating Engineers Appendix and the accompanying wage schedules in accordance with the direction set out in the preamble to the Operating Engineers Appendix, the result is ambiguous if not completely meaningless. As noted above, the collective bargaining relationship between the parties is extremely complex and in order to understand where the ambiguity arises, it is necessary to take a very detailed look at the language of the agreements before the Board.

8. As noted above, the preamble to the Operating Engineers Appendix refers specifically to wages, shift differential rates and overtime rates. For our present purposes we can ignore the hours of work exception. Those terms are the titles of specific articles in the Operating Engineers Appendix, which in turn refer to wage schedules attached to the Operating Engineers Appendix. However, when one examines the Operating Engineers Appendix in detail, the articles, for instance, are entitled as follows:

Article 1—Classifications; Article 2—Wages; Article 3—Hours of Work Miscellaneous Provisions; Article 4—Shift Differential Rate; Article 5—Overtime Rates; Article 6—Benefits; Article 7—Inclement Weather Pay; Article 8—Key Tradesmen; Article 9—Travel and Transportation; Article 10—Tools; Article 11—Protective Clothing and Equipment; and Article 12, which relates to wages, reads as follows in clause 2.1, generation station projects:

“The rates of pay for employees in the classifications covered by this Appendix and working on Generation Station Projects shall be set forth in the wage schedules attached hereto.”

Articles 4 and 5, which refer to shift differential rates and overtime rates, do not refer to the wage schedules but are specific provisions and, indeed, the overtime rates set out in Article 5 refer to the hours of work provisions in the master agreement.

9. There are, however, a number of other articles in the Operating Engineers

Appendix which refer to the wage schedules attached to the Appendix, namely, Article 1, Article 6, relating to benefits, and Article 12, which read as follows:

“Article 1

CLASSIFICATIONS

- 1.1 Classifications for the electrical power systems sector shall be as set forth in the wage schedules attached hereto.
- 1.2 Classifications on Lines and Stations Construction work in the electrical power systems sector shall be as set forth in area rate schedules.
- 1.3 If classifications are required that are not shown in the wage schedules or area rate schedules, they will be negotiated as required.

Article 6

BENEFITS

- 6.1 The Employer agrees to pay into operative welfare, pension and supplementary unemployment benefit plans the amount specified for welfare, pension and supplementary unemployment benefits as set forth in the wage schedules attached hereto for employees covered by this Appendix during the time they are covered.

The Union agrees to supply the Employer with all the information regarding the welfare, pension and supplementary unemployment benefit plans and also all administrative material that is required for the implementation of them.

Article 12

APPRENTICESHIP AND TRAINING PROGRAMS

- 12.1 The Employer agrees to pay into operative apprenticeship or training funds the amounts specified for apprenticeship or training as set forth in the wage schedules attached hereto for employees covered by this Appendix during the time they are employed.

The Union agrees to supply EPSCA with all pertinent information regarding these funds.

- 12.2. Training programs established by the Employer to provide skills required in the electrical power systems sector shall be funded by reducing the Employer's contribution to the training fund in the specific locality where the training is taking place by an amount of money equivalent to the cost of such programs.

Where apprentice mechanics are employed, there shall be more than (1) apprentice for every five (5) journeymen.

12.3 Employers whose primary function is structural steel erection *REV* and/or mechanical installations shall assign an apprentice, oiler and oiler-driver to each unit on all conventional truck mounted cranes with a manufacturers' rating of 25 tons capacity and over, all crawler cranes with a manufacturers' rating of 50 tons capacity and over, all truck mounted hydraulic cranes with a manufacturers' rating of 35 tons capacity and over, and all rough terrain type cranes with a manufacturers' rating of 45 tons capacity and over."

The wage schedule for the Bruce project is as follows:

"EPSCA OPERATING ENGINEERS APPENDIX
GENERATION STATION PROJECTS WAGE SCHEDULE

POWER SYSTEMS CONSTRUCTION
SITE PREPARATION AND EARTH DAMS

BRUCE PROJECT

<i>Classification</i>	<i>Effective Date and Hourly Rate</i>	
OPERATING ENGINEERS	<i>May 1/80</i>	<i>May 1/81</i>
Subforeman Rate—Appropriate Rate plus 50¢		
<i>Group 1</i>		
Engineers operating: skyway, climbing, and hammerhead type cranes; kangaroo, ringer and skyhorse type cranes, mobile and crawler type cranes 100 tons capacity and over.	\$13.40	\$14.26
<i>Group 2</i>		
Engineers operating: all conventional and hydraulic type cranes, save and except those set out in Group 1, including rough terrain cranes, clams, shovels, gradalls, backhoes, draglines, piledrivers, all power derricks, gantry cranes, caisson boring machines (over 25 HP), and similar drill rigs, mine hoists, and all similar equipment working on land or water, overhead cranes, chimney hoists, multiple drum hoists, single drum hoists (over 12 stories), single drum hoists of manual friction and brake type, and all similar equipment, dredges—suction and dipper, Pitman type cranes of 10 ton capacity and over, hydraulic jacking equipment on vertical slip forms,	*13.22	*14.08

hydraulic skoopers. Heavy duty mechanics, qualified welders and 2nd Class Stationary Engineers

*Base rate

<i>Classification</i>	<i>Effective Date and Hourly Rate</i>	
OPERATING ENGINEERS (cont'd)	<i>May 1/80</i>	<i>May 1/81</i>
<i>Group 3</i>		
Operators of: air tuggers used for installation of vessels, tanks, machinery, and for steel erection; side booms on land or booms on land or water; man and material hoists and single drum hoists 12 stories and under not of a manual friction and brake type; elevators, monorails, bullmoose type equipment of 5 ton capacity or over, air compressor feeding low pressure into air locks, tunnel moles. 3rd Class Stationary Engineers.	\$12.74	\$13.60
<i>Group 4</i>		
Operators of: bulldozers, tractors, scrapers, graders, emcos, overhead and front end loaders, side loaders, industrial tractors with excavating attachments, trenching machines, and all similar equipment, mobile pumpcretes, Pitman type cranes under 10 ton capacity, mobile pressure grease units, mucking machines, hydraulically operated utility pole hole diggers, and Dinky locomotive type engines. 4th Class Stationary Engineers.	12.59	13.45
<i>Group 5</i>		
Operators of: batching and crushing plants, 6" discharge pumps and over, wellpoint systems and all similar systems, concrete mixers of 1 cubic yard and over, gas, diesel, or steam driven generators over 50 HP (portable), fork lifts over 8' lifting height, air tuggers except those in Group 3, caisson boring machines (25 HP and under), drill rigs, post hole diggers, potable air compressors 150 CFM and over, and concrete pumps, Signalmen.	12.08	12.95
<i>Group 6</i>		
Operators of: boom trucks, 'A' Frames, driver	11.66	12.53

mounted compaction units, bullmoose type equipment under 5 ton capacity, fork lifts 8' and under in lifting height and conveyors. Firemen.

<i>Classification</i>	<i>Effective Date and Hourly Rate</i>	
OPERATING ENGINEERS (cont'd)	<i>May 1/80</i>	<i>May 1/81</i>

Group 7

Operators of: pumps under 6" discharge where 3 or more pumps are employed on the same job site, hydraulic jacking equipment for underground operations, portable air compressors under 150 CFM where attendant is required and driver mounted power sweepers. Attendants for forced air, gas or oil burning temporary heating units of 500,000 BTU or over per hour, or, 5 or more on the same job site, oilers, oiler-drivers, and mechanics' helpers.	\$11.44	\$12.30
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Miscellaneous Group

Skidder with Hydraulic Attachments	12.08	12.95
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Heavy Duty Mechanic Apprentice Rates	% of Journeyman Rate		
1st period	50	6.61	7.04
2nd period	60	7.93	8.45
3rd period	70	9.25	9.86
4th period	80	10.58	11.26
5th period	90	11.90	12.67

MARINE CLASSIFICATIONS

Dredge Engineer	11.98	12.58
Welder Deckhand—Dredge	11.98	12.58
In-Shore Tugboat Operator	10.58	11.18
Deckhand—Tugs and Dredge	9.38	9.38

FIREFIGHTERS

Firefighter—to start	**68%	8.99	9.57
Firefighter—after 3 months	**70%	9.25	9.86

Welfare and Pension payments: \$1.00 (30¢ welfare and 70¢ pension) per hour is paid extra to the rate for each of the above Operating Engineer and Firefighter classifications.

Training payments: 2¢ and 3¢ May 1, 1981 per hour training is paid extra to the rate for each of the above Operating Engineer and Firefighter classifications.

****Established as a percentage of base rate."**

Several things should be noted about the wage schedule. First, it refers to classifications of operating engineers, marine classifications and firefighters, and that wage rates are set out for each specific classification. Of the operating engineers' classifications, it is to be noted that groups 1 and 2 deal with engineers operating various pieces of equipment, whereas groups 3, 4, 5, 6 and 7 refer simply to operators of various pieces of equipment. The other point of importance is to note the specific language referring to the payments in question, namely that welfare and pension payments talk specifically in terms of "*to the rate of each of the above operating engineer and firefighter classifications*". (emphasis added)

10. If we take the preamble of the Operating Engineers Appendix to mean that for wages, weekly hours of work, shift differential rates and overtime rates that the appropriate payments shall "be as established by the nearest influencing representative agreement" and that agreement is the Evans agreement, we must now try and apply the Evans agreement to the Operating Engineers Appendix. Article 12 of the Evans agreement reads as follows:

"ARTICLE XII—'WAGE RATES AND CLASSIFICATIONS'

For Local 183

	<i>May 1/80</i>	<i>Nov 1/80</i>	<i>May 1/81</i>	<i>Nov 1/81</i>
Labourers (including sod roller operators)	\$9.00	\$9.20	\$9.75	\$9.95
Land Gardeners	\$15	\$9.35	\$9.90	\$10.10
Farm tractors without excavating attachments, fork lifts, truck drivers, load bearing boom trucks	\$9.10	\$9.30	\$9.85	\$10.05
Form Setters, concrete finishers, landscape stone setters, landscape brick setters landscape irrigation, pipelayers, float drivers, Reinforcing steelman	\$9.30	\$9.50	\$10.05	\$10.25
	<i>May 1/80</i>	<i>Nov 1/80</i>	<i>May 1/81</i>	<i>Nov 1/81</i>
Operators, machine driven tools	\$9.10	\$9.30	\$9.85	\$10.05

For Local 793

Grader Operator	\$9.80	\$9.95	\$10.60	\$10.70
Dozer & Loader Operator & Backhoe Operator	\$9.70	\$9.85	\$10.50	\$10.60
Drivers of Farm Tractor with pulverizing or fine grading equipment	\$9.70	\$9.55	\$10.35	\$10.45"

It will be seen at a glance that the classifications for Local 793 under the Evans agreement do not correspond at all to the classifications in the wage schedule. Nor, is it possible to fit them in. For instance, a grader operator, dozer and loader operator may very well fit into group 4 of the wage schedule, but backhoe operators are run by group 2 engineers and nowhere does the wage schedule refer to drivers of farm tractors with pulverizing or fine grading equipment. Even more puzzling is the fact that boom truck operators and fork lift operators rather than being related to group 6 of the wage schedule, are in fact covered by Local 183 in the Evans agreement. In sum, the Evans agreement cannot be applied to the wage schedule *without taking both the classification as well as the "wage" and substituting them rather than applying them to the Operating Engineers wage schedule.*

11. However, by the grievor's own argument, classifications are not modified by the preamble to the Operating Engineers Appendix. We are thus of the view that since the preamble purports to amend the wages provided in the Appendix without modifying the classifications relating to those wage payments in the wage schedule, the preamble contains an ambiguity on its face.

12. Indeed, we are of the view that if one tries to fit the classifications in the Evans agreement there is a further ambiguity in interpreting the welfare and pension and pension payment and training payment provision of the wage schedule which in turn refers to "each of the above operating engineer and firefighter classifications". Since, as noted above, the classifications do not refer to drivers of "farm tractors with pulverizing or fine grading equipment", it would thus appear that there is an ambiguity between the preamble and the wage schedules when one attempts to apply the Evans agreement as instructed by the preamble. If one does not vary the classifications, the wage schedule makes no sense, but if one varies the classifications then one is using a different wage schedule than that appended to the Operating Engineers Appendix, in which case there is no reference to welfare, pension benefits and training benefits. There is thus a clear ambiguity on the face of the agreement between the parties and, furthermore, that ambiguity, since it relates to the wage schedule, relates to the very basis of the present grievance, that is, the payment of benefits and training fund as set out in the wage schedule.

13. In view of the foregoing finding of ambiguity, the Board is entitled to look to extrinsic evidence concerning the intention of the parties and, in particular, the intention of the parties concerning both the preamble and the wage schedule. Here the evidence was quite clear. For landscaping contracts no wage schedule similar to the one quoted above it generated. In fact, what happens is that a letter is sent from The Electrical Power Systems Construction Association to the Ontario Allied Construction Trades Council. This has gone on for a number of years but we will quote in detail from the most recent letter:

*"Landscaping Conditions
—EPSCA Agreement*

When employing operating engineers on landscaping in the electrical power systems sector of the construction industry, the classifications, wages, weekly hours or work, shift differential rate, and overtime rate shall be as follows:

Classifications and Wage Rates

	<i>May 1/80</i>	<i>Nov 1/80</i>	<i>May 1/81</i>	<i>Nov 1/81</i>
Grader Operator	\$9.80	\$9.95	\$10.60	\$10.70
Dozer and Loader Operator and Backhoe Operator	9.70	9.85	10.50	10.60
Drivers of Farm Tractor with Pulverizing or Fine Grading Equipment	9.55	9.70	10.35	10.45

Pension Payments: 20¢, 30¢ November 1, 1980 and 40¢ November 1, 1981 per hour is paid extra to the rate for each of the above classifications.

Weekly Hours of Work

The Weekly Hours of work shall be fifty (50) hours per week.

Shift Differential Rate

Employees required to work shift work, other than the regular day shift, shall receive the following shift differential:

Second Shift: 25¢ per hour

Overtime Rate

Overtime shall be paid at one and one-half times the basic rate for hours worked in excess of 10 hours in any one day, Monday to Friday, and for all hours worked on Saturday.

Two times the basic rate for all hours worked on Sunday and Statutory Holidays listed in the master portion of this Agreement.

For all other conditions relative to landscaping in the electrical power systems sector, the conditions contained in the EPSCA Collective Agreement shall apply.

This advice replaces our previous advice to you dated September 20, 1978 regarding the employment of operating engineers on landscaping.”

That letter reflects the Evans agreements. It is to be noted that the pension payments are substantially different from those in the typical wage schedule to the Operating Engineers Appendix.

14. The evidence is that this sort of communication has occurred since 1975 when the first Operating Engineers Appendix was put into effect under the EPSCA agreement. No issue appears to have been taken with this interpretation of the agreement by EPSCA, and, indeed, the evidence is that this is how employees working on landscaping have been paid. The evidence of Mr. Bill O'Neill, who is the general manager of EPSCA, is that this has reflected the consistent interpretation given by the parties to the preamble to the Operating Engineers Appendix. Further, there is evidence that the issue was raised by Mr. Gauthier in negotiations that the preamble to the Appendix was not being properly interpreted. However, he was not successful in this argument and one can only conclude that the parties to the bargaining accepted the practice of applying the Evans agreement as set out in the letter above.

15. We are, therefore, of the view that the parties intended the preamble to the Operating Engineers Appendix to modify that Appendix as set out in the letter of November 5, 1980 from EPSCA to the Allied Council. That being the case, the grievances herein must fail and the grievance is therefore dismissed.

2135-79-R Labourers' International Union of North America, Local 183, Applicant, v. **F. W. Woolworth Co. Limited** Respondent v. Group of Employees, Objectors.

Bargaining Unit-Whether single warehouse or all four of respondents warehouses in Metro Toronto appropriate bargaining unit-Whether employees of single location having community of interest with employees of other locations-Board considering *Usarco* criteria

BEFORE: Ian Springate, Vice-Chairman, and Board Members C. G. Bourne and H. Kobryn.

APPEARANCES: *B. Fishbein for applicant; R. A. Werry for respondent; T. Smith and C. Young for the objectors.*

DECISION OF THE BOARD; June 19, 1981

1. The name of the respondent is amended to read: F. W. Woolworth Co. Limited.
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

4. By way of this application the applicant is seeking to be certified as the bargaining agent for employees of the respondent employed at its warehouse on 277 Humberline Drive in Metropolitan Toronto. The respondent, however, contends that the unit should be described so as to encompass employees at all four of its warehouses (or distribution centres as they are sometimes called) in Metropolitan Toronto.

5. The respondent is primarily engaged in the retail industry and operates both "Woolworth" and "Woolco" stores across Canada. Its head offices for Canada are located in Toronto, as is its main warehouse for Canada which is situated on Sheppard Avenue.

6. The respondent opened its Sheppard Avenue warehouse in 1964, at which time it had no other warehouse facilities in Metropolitan Toronto. Notwithstanding two additions to the warehouse, as early as 1973, lack of sufficient space at Sheppard Avenue resulted in the respondent shifting some of its warehousing operations to other warehouses in Metropolitan Toronto. It is the intent of the respondent to, at some point in the future, build a new warehouse facility large enough to enable it to once again have all its warehousing facilities in Metropolitan Toronto under a single roof. As of yet, however, no land has been acquired for such a facility, and it appears that no such facility is likely to be constructed prior to 1983.

7. As already indicated, the Sheppard Avenue facility is the respondent's central warehouse for all of Canada. The facility contains offices for both the senior management and the office personnel associated with the respondent's warehousing activities on a nation-wide basis. Between 120 and 170 non-managerial warehouse personnel work in the warehouse. Also based at Sheppard Avenue are seven equipment maintenance personnel who are responsible for repairing equipment at all four of the Toronto warehouses.

8. The respondent has another warehouse on Steeles Avenue. This warehouse has about 102,000 square feet and employs 20 and 30 warehouse personnel. A third Toronto warehouse is situated on Midland Avenue. This warehouse, which serves the respondent's catalogue stores, has some 112,000 square feet and only about ten warehouse personnel.

9. The respondent's remaining Toronto warehouse is the one on Humberline. The applicant contends that the employees at this single facility constitute an appropriate bargaining unit. The warehouse has 106,000 square feet and employs between 25 and 30 warehouse personnel. This warehouse handles a variety of items, but at least half of its area is taken up with bulky merchandise such as furniture and large appliances. The Humberline warehouse is about seven miles from the one on Sheppard Avenue, six miles from the one on Steeles Avenue and 22 miles from the one on Midland.

10. All four of the respondent's Toronto warehouses receive goods from across Canada and abroad and ship goods out to the respondent's stores. Goods are moved into and out of the warehouses primarily by independent carriers. The respondent has no other warehouses in Ontario, although it has regional distribution centres in Calgary, Winnipeg, Montreal, Dartmouth and St. John's, Newfoundland. The respondent also has two specialty warehouses, one in Montreal for textiles and the other in Vancouver for imports from the Orient.

11. There is a fair amount of movement of goods between the respondent's various warehouses, including the one on Humberline. The shipment of goods between the warehouses is done primarily by outside carriers.

12. Although the respondent has a number of senior personnel who are responsible for its warehousing function, each of the warehouses also has its own local manager. Mr. Sockett, a Vice-President and Director of Personnel is the respondent's senior personnel official. Under Mr. Sockett is Mr. D. Delvechio who is Personnel Manager for the Warehousing and Distribution Centres. Mr. Delvechio is based at the Sheppard Avenue warehouse, but has responsibilities for warehousing personnel across Canada.

13. Although Mr. Delvechio has responsibilities with respect to personnel matters at all of the respondent's warehouses, he is involved with day-to-day personnel matters only at Sheppard Avenue, which is where he has his office. Job applicants who apply at another warehouse are interviewed by the local manager and the local manager can hire them. However, if the local manager has any questions or uncertainties about a particular job applicant he is expected to discuss the matter with either Mr. Delvechio or Mr. Sockett. For example, if a local manager encounters a job applicant who had previously worked for the respondent at another location, the manager will contact either Mr. Delvechio or Mr. Sockett to ascertain what his previous work record had been. At times the Sheppard Avenue facility has more qualified job applicants than vacancies. If Mr. Delvechio is aware of vacancies at another warehouse, he might arrange with the local manager to have these vacancies filled by job applicants at Sheppard Avenue. In such a situation, if Mr. Delvechio has already interviewed and approved a job applicant at Sheppard Avenue that individual will not be re-interviewed at another warehouse.

14. Employees at all four warehouses have an initial three-month probationary period. The assessment of probationary employees at the Humberline warehouse is done by the local manager, and he decides whether a probationer will be retained. Prior to any probationary employee being let go, the manager must first discuss the matter with Mr. Delvechio so that Mr. Delvechio can verify the employee's probationary status and also assure himself that the manager's decision not to retain the employee was based on proper work-related matters.

15. The respondent disciplines employees by way of written warnings and, ultimately, through discharges. Written warnings are issued by the local manager, although the manager is expected to seek guidance from Mr. Delvechio, in part to allow Mr. Delvechio to ascertain whether the warning is justified. The personnel files for the Humberline warehouse are kept at Humberline. Local warehouse managers make the initial decision to terminate an employee, although prior to any actual termination the manager must contact Mr. Delvechio so that Mr. Delvechio can assure himself that the manager's expectations for the employee were not unreasonable and that the employee had been given an opportunity to improve his performance.

16. The Manager at Humberline can grant employees time off and he is responsible for scheduling employee vacations. The hours of work of employees at Humberline are somewhat different from those of employees at Sheppard Avenue.

17. Prior to the filing of the application, employees at Humberline received a higher starting salary than did employees at the other three Toronto warehouses. Prior to February of 1980 the Humberline employees received different wage increments than did employees at the other warehouses. Fringe benefits are the same at all four warehouses, and indeed most fringe benefits are the same right across the country. If an employee has any questions about his pay he will raise them with the local manager.

18. There is considerable material before the Board concerning the interchange of employees between the respondent's various warehouses. The great bulk of this interchange did not involve the Humberline warehouse at all. There was apparently no permanent transfers involving Humberline employees in 1975, 1976 or 1977. In 1978 a Humberline employee was promoted to a managerial job at St. John's, Newfoundland. In 1979 a supervisor at Midland was demoted to a position at Humberline. Also in 1979, five or six employees who had been working on the consolidation of orders from various warehouses at Humberline were moved over to Sheppard Avenue when the respondent started having the consolidated function performed by employees of a trucking company.

19. There have been a fair number of temporary transfers of employees between the respondent's Toronto warehouses. Here again, however, relatively few of these transfers appear to have involved Humberline. The only detailed information before us concerning temporary transfers involved the year 1979. In that year all of the temporary transfers involving Humberline were in the period of late May to early August when, because of a lack of space at Humberline, some furniture which otherwise would have been stored at Humberline was stored at Sheppard Avenue. At various times during this period employees from Humberline were sent over to Sheppard Avenue to do work related to the storing of this furniture. Once Humberline furniture ceased to be stored at Sheppard Avenue there were no temporary transfers of employees between the two warehouses.

20. In determining whether a group of employees at one of a number of locations within a municipality by themselves constitute a viable bargaining unit, the Board looks primarily to the community of interest between the employees and the employees working at the other locations. In the *Usarco* case [1967] OLRB Rep. Sept. 526 the Board set out the factors which are relevant to the issue of community of interest, namely: 1) nature of the work performed; 2) conditions of employment; 3) skills of employees; 4) administration; 5) geographic circumstances; 6) functional coherence and interdependence.

21. In the instant case, the nature of the work, conditions of employment and skills of employees at all four of the respondent's warehouses in Metropolitan Toronto appear to be basically the same, and indeed the indications are that they are similar at all of the respondent's warehouses across Canada.

22. With respect to the administration of the warehouses, all of the respondent's warehousing employees in Canada come under the same senior management. However, the matters of administration that bear most directly on employees, such as hiring and firing, granting time off, the scheduling of vacations and so on, are dealt with in the first instance at the Humberline warehouse. In addition, the employees at Humberline perform their work under the immediate supervision of the local Humberline manager and the employees deal with the local manager on matters such as questions about their pay.

23. With respect to the issue of the geographic separation of employees, although all four warehouses are in Metropolitan Toronto, the other three warehouses are, six, seven and 22 miles away from Humberline. Because of the distances involved it is reasonable to assume that during the day Humberline employees do not have any social contact with employees at the other warehouses.

24. We turn now to consider the criteria of functional coherence and interdependence.

There is no question but that in terms of product flow, the respondent's four warehouses are interdependent. There is also a history of a considerable number of transfers of employees between certain of the warehouses, but less so with respect to Humberline. Between 1975 and 1978 there was only one permanent employee transfer involving Humberline, and this was connected with the promotion of an employee to a managerial position at another warehouse. In 1979 a supervisor for another warehouse was demoted into the proposed bargaining unit at Humberline. We would note that moves such as these, accompanied by a promotion out of, or a demotion into, the proposed bargaining unit are not the type of transfers that generally effect the collective bargaining process. In 1979 the respondent ceased its practice of consolidating shipments at Humberline, and five or six employees involved in this function were transferred to Sheppard Avenue. However, in 1979 there were no permanent transfers out of Humberline of employees engaged in the normal warehousing functions. With respect to temporary transfers, the only indication of such transfers involving Humberline was during a period when, because of a space problem, "Humberline products" were stored at Sheppard Avenue and cared for by Humberline employees.

25. This not a case where a review of the relevant criteria clearly points the way to the answer as to what is the appropriate bargaining unit. However, we are satisfied that notwithstanding the fact that the respondent's warehouses show a high degree of integration insofar as the handling of merchandise is concerned, the employees at Humberline do constitute a discrete group of employees quite separate and apart from the other warehouse employees, and that the degree of staff interchange involving Humberline is not sufficient to detract from this fact. Further, although the employees at Humberline perform basically the same work as the employees in other warehouses, because of their being grouped together away from the other employees, and working under local supervision, we are of the opinion that the employees at Humberline have a community of interest of their own quite separate and apart from the employees at the other warehouses. In all the circumstances then, we are of the view that the employees at Humberline, with the appropriate exclusions, by themselves constitute a unit of employees appropriate for collective bargaining.

26. The Registrar is directed to re-list this application for hearing with respect to all outstanding matters.

0230-81-R International Woodworkers of America, Local 2-353, Applicant, v. G.A.C. Industries Ltd., Respondent.

Sale of a Business-Respondent conceding sale took place-Whether Board having discretion to declare bargaining rights do not continue despite sale

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and M. J. Fenwick.

APPEARANCES: *Naomi Duguid, Harold Sachs, John Hackett and John McCarthy for the applicant; J. P. Wearing and R. Baylum for the respondent.*

DECISION OF THE BOARD; June 26, 1981

1. The name of the respondent is amended to read: "G.A.C. Industries Ltd."
2. The International Woodworkers of America, Local 2-353 ("the union") has applied under section 55 of *The Labour Relations Act* for a declaration that the respondent G.A.C. Industries Ltd. ("G.A.C.") is the successor employer in the sale of a business which the union alleges has taken place between G.A.C. and Travel Mate Motor Homes Limited ("Travel Mate"). The union is also seeking a declaration that, as a consequence of the sale, G.A.C. is bound to the collective agreement between Travel Mate and the union which purports to be effective from August 23rd, 1979 until August 22nd, 1981.
3. At the hearing into this application, counsel for G.A.C. admitted that a sale within the meaning of section 55 of the Act had taken place between G.A.C. and Travel Mate and that Travel Mate and the union were parties to the aforementioned collective agreement. Counsel contended, however, that the Board had a general discretion under section 55 to declare a successor employer in a sale of a business not to be bound by the collective agreement to which a predecessor employer and a union had been bound. Counsel further contended that, in the instant application, there were terms in the collective agreement between Travel Mate and the union relating to a sale of a business which should cause the Board to exercise that general discretion and declare that G.A.C. was not bound to the collective agreement between Travel Mate and the union.
4. G.A.C. counsel submits that section 55 requires the Board to make two separate determinations: first, whether a sale of a business has taken place; and second, if a sale has taken place, the Board must determine what bargaining rights flow through to the successor employer as a result of the sale. In other words, counsel views section 55 as setting up a dual obligation for the Board and the latter one of these, that is the obligation to determine what bargaining rights flow through to a successor employer, creates, in counsel's view, the Board's discretionary authority to determine whether those rights are to flow through. Counsel submits further that the words "... until the Board otherwise declares..." support his interpretation of the section and give to the Board the discretion to declare whether the bargaining rights are to continue.
5. Applicant counsel takes the contrary position. Counsel submits that the Board is required to make a finding as to whether a sale of a business has taken place. Where the Board finds that there has been a sale, the existing bargaining rights automatically flow through to

the successor employer. Counsel submits further that the words "... until the Board otherwise declares..." are intended only to accomodate other sub-sections of section 55 which deal with a variety of circumstances that may arise out of a sale of a business and which sub-sections empower the Board to fashion alternate remedies to the automatic flow through of bargaining rights.

6. The Board views sub-sections 2 and 3 of section 55, which are set out below, to be declaratory in nature and to have the purpose of protecting the bargaining rights of employees in the business which is sold and those of the trade union which is their bargaining agent.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires.

This general declaratory nature is modified by other sub-sections in order to accomodate complications which may arise in the sale of a business. These sub-sections empower the Board to apply remedies other than the protective provisions of sub-sections 2 and 3. It may re-define the bargaining unit (sub-section 4): terminate bargaining rights where the purchaser of the business has changed its character so that it is substantially different from the business of the predecessor employer (sub-section 5): and, where there has been an intermingling of employees, declare that the successor owner is no longer bound by the a collective agreement, determine proper bargaining unit configuration and declare which unions have bargaining rights in respect of that unit and amend any certificates which it has issued or any bargaining units defined in any collective agreement (sub-section 6).

7. The fact that sub-section 6 is operative notwithstanding sub-section 2 and 3 lends credence to the Board's view that those two sub-sections are declaratory in nature. That seems to be the view of the Board in its decision in *Bermay Corporation Limited*[1979] OLRB Rep. July 608, in which the Board was dealing with the circumstances in a sale of a business where part of the work force of the predecessor employer was merged with the existing work force of

the successor employer. A trade union held bargaining rights for the employees of the predecessor employer and they constituted one-third of the merged work force. The other employees were not represented for collective bargaining purposes by any trade union. The Board relied on its specific powers under sub-sections 6 and 8 to deal with the problem. In this respect, see paragraphs 17 and 18 wherein the Board stated:

17. "... While section 55 of the Act operates to protect the bargaining rights of those employees and their union it also provides a mechanism to balance their interest with the interest of the respondent's former employees and new employees who work side by side with them. Section 55(6) of *The Labour Relations Act* provides:

"(6) Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement."

18. An obvious concern in the resolution of the conflict that arises upon the intermingling of employees who have previously been organized with employees who were previously not organized is the interest of the employer to have its industrial relations conducted within the framework of a rational bargaining structure. In this case, the Board is satisfied that it would be contrary to the interests of the employer and of the employees as a group to segregate the former employees of Goldcrest into a vestigial bargaining unit that would exclude all other production employees. It would, in our view, be equally inappropriate to effectively grant the bargaining rights for the two thirds of the production employees who have not previously been organized to the applicant without any indication of the wishes of that majority group. The Board is therefore satisfied that it should in these circumstances describe the appropriate bargaining unit and exercise its discretion under section 55(8) of *The Labour Relations Act* to conduct a representation vote among all of the employees in the bargaining unit".

8. There would be no need for subsections 4, 5, 6 and 8 were the the Board to have broad discretion under section 55 as G.A.C. counsel contends. Moreover, if the Legislature had intended the Board to have wide powers to deal with the bargaining rights of trade unions and to protect the interests of employees when there has been a sale of a business, it would have set out the Board's general discretion and defined its specific authority, as needed, in terms similar to those used elsewhere in the Act. For example, contrast the definition of the Board's powers in section 79(4) of the Act with those in section 55(2) and (3):

Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, persons or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, *without limiting the generality of the foregoing* may include, notwithstanding the provisions of any collective agreement any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.
[emphasis added]

While in clauses (a), (b) and (c), the Act gives the Board power to grant specific forms of relief, the phrase "... without the limiting of generality of the foregoing ...," in the preamble to those clauses makes it abundantly clear that the Board's remedial powers are not limited to those enumerated, specific powers.

9. In a similar fashion, compare sections 55(2) and (3) with sections 82 and 83 of the Act where the Board "... in its discretion, ... may direct what action if any a person ... shall do or refrain from doing ..." when it has declared a strike or a lockout to be unlawful. That language leaves no doubt about the discretionary nature of the power conferred, or that the power is being conferred by those sections.

10. Section 1(4) of the Act likewise makes it clear that the Board has the discretionary authority to "... treat ... corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and [to] grant

such relief, . . . , as it may deem appropriate." in circumstances where, in its opinion, two or more business entities under common control or direction are carrying on associated or related activities or businesses. Nor can there be any doubt that the Board's authority is conferred by section 1(4).

11. In the Board's view, had the Legislature intended the Board to have wide discretion as to the flow through of bargaining rights in section 55, it could have made a clear grant of that power, as it has done so in other sections of the Act. As it is, the Act confers, as already noted above, specific authority on the Board to deal with particular circumstances arising out of the sale of a business and section 55 is devoid of any clear grant of wider discretion. Furthermore, the Legislature had ample opportunity when section 55 was amended in 1970 to include the flow through provisions, to provide the Board with the discretion to decide whether bargaining rights should flow through. The Legislature has not done so and to accept G.A.C. counsel's proposition would be to give section 55(2) a meaning which the Legislature did not intend.

12. Having regard to G.A.C.'s admission of the sale and to the existence of a collective agreement between the predecessor employer and the union, the Board finds that there has been a sale of business from Travel Mate Motor Homes Limited to G.A.C Industries Limited within the meaning of section 55 of the Act.

13. Accordingly, G.A.C. Industries Limited is bound by the collective agreement between Travel Mate Motor Homes Limited and the International Woodworkers of America, Local 2-353 which purports to be effective from August 23rd, 1979 until August 22nd, 1981.

0086-80-R Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Grand Valley Ready Mixed Concrete Supply Limited**, and K-W Blair Readymix (1973) Limited, Respondents, v. Christian Labour Association of Canada, Intervener

Sale of a Business-Predecessor closing down one of its locations-Successor expanding his operation by purchasing equipment and obtaining transfer of lease from business shut-down-Whether resulting business having roots in predecessor's or successor's business-Whether sale of part of a business

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members R. D. Joyce and S. Lewis.

APPEARANCES: *Stanley Simpson and Leonard Schultz for the applicant; Robin B. Cumine and Brian Gedney for Grand Valley Ready Mixed Concrete Supply Limited; S. C. Bernardo and W. Carter for K-W Blair Readymix (1973) Limited; Elizabeth J. Forster and Hank Beekhuis for the intervener.*

DECISION OF THE BOARD; June 12, 1981

1. This is an application filed under section 55 of *The Labour Relations Act* claiming a sale of a business within the meaning of the section and seeking a declaration that Teamsters Local 879, the applicant, holds bargaining rights for certain employees of Grand Valley Ready Mixed Concrete Supply Limited, the alleged successor employer.

2. The applicant also applied under section 1(4) of the Act but subsequently withdrew in respect of its attempt to seek relief under this section.

3. The applicant trade union holds bargaining rights for all employees of K-W Blair Readymix (1973) Limited, hereinafter referred to as K-W Blair, "in the capacity of truck drivers, mechanics, mechanics' helpers and batchers who are not performing supervisory duties, in the locations of the Company at Galt, Breslau, Kitchener, Waterloo and Paris, Ontario..." The scope of the applicant's bargaining rights vis-a-vis the employees of K-W Blair is described in a subsisting collective agreement; the most recent in a series of collective agreements between these parties. K-W Blair came into existence in 1973 following the purchase of K-W Readymix by Blair Readymix; the latter company owned by Carter Construction Company. The new company, K-W Blair Readymix (1973) Limited, operated from two Kitchener plants, a Cambridge plant and a Waterloo plant. In 1976 K.W. Blair built a semi-portable plant in Paris, Ontario. Three drivers and a batcher were assigned to work out of the Paris plant. Voluntary recognition was extended to Teamsters Local 879 in respect of these employees. Although a separate seniority list was maintained for the Paris location, this arrangement was discontinued in November, 1978 when the Paris division was included with Galt, Breslau, Kitchener and Waterloo for purposes of seniority. The effect of this arrangement was to place the Paris employees at the bottom of the combined seniority list.

4. K-W Blair's Paris operation did not meet the expectations of its owners. Volume reached a peak of 1,118 cubic metres in the month of October, 1976. The company hoped to

increase volume by 20%-30% the following year so that it could produce the 10,000 cubic metres (during the May-November season) needed to break even. The evidence establishes that the company did not come close to its production targets. Mr. W. S. Carter, the owner of the business, testified that the company "lost its shirt" on its Paris operation. On November 16, 1977 the three drivers working out of the Paris operation were laid off. Since November 16, 1977 the company has not had any employees working out of its Paris location. Mr. Carter testified that "in mid 1977 we essentially stopped operating out of Paris — we pulled out the trucks and people and put the plant in a moth-balled situation." Since that time the facility has been used as a refill plant or as a peaking station for work emanating from its other plants. K-W Blair drivers working out of its other plants have occasionally used the plant to refill for second loads when delivering into the Paris — Brantford market, or to meet local demands at peak times. When the plant has been used in this manner employees of Ultra Stone (a company operating out of the same premises in which Mr. Carter holds a minority interest) have done the batching. The evidence establishes that only 2,800 cubic metres of concrete was processed through the Paris plant in 1978 and only 519 cubic metres to the end of September, 1979. The last order processed by K-W Blair out of its Paris plant was in September, 1979 and was for 5.5 cubic meters of concrete.

5. Grand Valley Ready Mixed Concrete Supply Limited, hereinafter referred to as Grand Valley, commenced business in 1976. Mr. Brian Gedney and Mr. Ed. Tysolski, both of whom had extensive experience in the ready-mix business in the Paris-Brantford area, were its sole owners. The business operated from a plant on Papple Road in the township of Brantford. The business was successful in acquiring a major share of the local market. However, because of the competition generated by the larger companies operating in the area, Grand Valley had to cut its prices in order to maintain its market share. The business is one which is extremely price sensitive. Indeed, Mr. Carter, in reference to price sensitivity, testified that "10¢ will get you a job." Although Grand Valley was able to maintain its share of the market it found itself in severe financial difficulties in early 1979. Mr. Gedney testified that the company had a serious cash flow problem. The evidence is that Grand Valley was on the verge of bankruptcy.

6. Grand Valley employed 8 persons from its inception. The Christian Labour Association of Canada (CLAC), an intervener in this matter, was certified as bargaining agent for the employees of Grand Valley working in the Township of Brantford on May 1, 1979. Grand Valley and CLAC entered into a collective agreement on May 22, 1979 for the period May 1, 1979 to March 31, 1981 and have since entered into a successor agreement.

7. Mr. W. S. Carter was made aware of the financial difficulties confronting Grand Valley by the owners of Telephone City Gravel; a creditor of Grand Valley. Mr. Carter contacted Mr. Gedney in early 1979. An agreement in principle was reached on May 3, 1979 under which the Carter Construction Company (1973) Limited acquired 70% of the common shares of Grand Valley for the sum of \$1. As a condition of the agreement, Carter was to arrange for a \$70,000 line of credit and to arrange for the release by the Bank of the personal securities of Gedney and Tysolski. In addition, Carter was to arrange a "satisfactory compromise" of certain accounts owned by Grand Valley. the day-to-day running of the Corporation was to be left in the hands of Gedney and Tysolski. However, Mr. Carter, through the controller of K-W Blair, was to maintain tight control over the financial dealings of Grand Valley and has done so. Mr. Carter, Mr. T. Scanlon (K-W Blair Controller), Mr. P. Hall (K-W Blair Vice-President Operations) and Mr. B. Wallace (K-W Blair Vice-President

Sales) joined Messrs. Gedney and Tysolski on the Grand Valley Board of Directors. The agreement under which Carter acquired control of Grand Valley was finalized in June, 1979. Messrs. Gedney and Tysolski have no interest in K-W Blair or in any of the other Carter companies.

8. Grand Valley continued to operate out of its Papple Road location after the agreement with Carter had been concluded and continued to employ those who had been in its employ prior to this time. However, in September, 1979 Grand Valley purchased from K-W Blair, another Carter company, the aggregate storage bins and weigh batcher, the cement storage silo and weigh batcher, the conveyor system and air compressor to run it, and the boiler and batch control panel which had been the components of the K-W Blair plant at Paris. The property on which the K-W Blair plant was located is owned by Tullis Estates (another company controlled by the Carter family). The lease held by K-W Blair was transferred to Grand Valley at the same time. There was no provision in the transaction between K-W Blair and Grand Valley for the transfer of goodwill or customer lists. Grand Valley moved its trucks and its employees from the Papple Road location to the site of the former K-W Blair plant in Paris in October, 1979. Grand Valley commenced to operate from this site in October, 1979 under its own name using its own trucks and its own employees. The operation remained within the township of Brantford which is within the scope of the Christian Labour Association's bargaining rights. K-W Blair continued to tender on some jobs in the Brantford area and to do some business in the area, in competition with Grand Valley, from its other plants.

9. It is the transaction between Grand Valley and K-W Blair which has given rise to the instant application by Teamsters Local 879. The scope of the Teamsters' bargaining rights, as set out in the agreement between itself and K-W Blair, extends to Paris, Ontario. The Teamsters' bargaining rights were extended to Paris in 1976 in order to cover the K-W Blair plant located there; the same plant which currently houses the Grand Valley operation. Teamsters Local 879 maintains that when Grand Valley purchased the K-W Blair Paris plant it purchased a part of K-W Blair's business so that under Section 55 of the Act Local 879 is the bargaining agent for the employees now working at the site. There are the same employees who were represented by the Christian Labour Association when they worked for Grand Valley at Papple Road and for whom the Christian Labour Association continues to claim bargaining rights by virtue of the scope of its recognition under the collective agreement between itself and Grand Valley.

10. The applicant maintains that the transaction by which Grand Valley obtained use of the Paris plant of K-W Blair constituted the sale of part of K-W Blair's business to Grand Valley. The applicant argues that the same business (i.e. same product, same market, same supplies and same equipment) was carried on before and after the transaction. It is the applicant's contention that the only difference in the business after the sale was the increased volume. The applicant, while asking the Board to find on the evidence that K-W Blair continued to operate out of its Paris plant up to September, 1979, attributes the increase in business volume following the sale to the price sensitivity of the ready-mix business. It is the applicant's position that the successor, Grand Valley, was able to compete more effectively because it was no longer burdened with the Teamsters' collective agreement and was able to operate out of the more efficient plant which had been the base of operations for K—W Blair in the Brantford area. The applicant asks the Board to pay special attention to the timing of the first transaction relative to the certification of the intervener trade union and the timing of the

second relative to the last loads transported by K-W Blair from its Paris plant. The applicant asks the Board to find that section 55 applies and to declare its collective agreement with K-W Blair binding on Grand Valley.

11. The respondent, K-W Blair, rests its argument on the fact that its Paris facility was little more than an idle asset in the two-year period prior to the alleged section 55 transaction. The respondent, K-W Blair, characterizes the business as essentially one of transportation. In the face of K-W Blair's inability to transport concrete on any meaningful scale from its Paris plant in the two years preceding the alleged sale, and in the face of Grand Valley carrying on an identifiable and viable business prior to the sale, the respondent, K-W Blair, asks the Board to find that Grand Valley purchased certain idle assets owned by K-W Blair to further its own business. It is the submission of K-W Blair that the business continued to operate after the transaction as it had before and that at all times it was bound by collective agreement with the Teamsters. In that the successor must draw its life from the predecessor in order to constitute a sale of a business within the meaning of section 55, the respondent K-W Blair asks the Board to find that it is the alleged successor's business which continues to exist and that therefore a sale of a part of K-W Blair's business has not taken place.

12. The respondent Grand Valley characterizes K-W Blair's operation in the two years prior to the alleged section 55 transaction as simply a convenience to its main business and asks the Board to be mindful of the fact that at no time in this period did it serve as a base for employees. The respondent asks the Board to contrast K-W Blair's Paris operation to that of Grand Valley, 1979 than had been processed through K-W Blair's Paris plant in the preceding year. The respondent Grand Valley describes the ready mix business as comprising customers, goodwill and drivers who know the customers. Grand Valley argues that, on the basis of these elements constituting the business, the Board must conclude that Grand Valley's business continued. The respondent Grand Valley points out that the effect of a contrary finding would place Grand Valley's employees under a closed shop collective agreement. It is argued that these employees, who have selected CLAC as their bargaining agent, would be required to join the Teamsters or risk losing their employment. The respondent Grand Valley maintains that this result should be avoided.

13. The Christian Labour Association adopts the submissions of the two respondents and maintains that in the absence of any credible evidence to impugn the legitimacy of its bargaining rights they must be give effect.

14. The relevant provisions of section 55 of the Act provide:

"55. (1) In this section,

- (a) 'business' includes a part or parts thereof;
 - (b) 'sells' includes leases, transfers and any other manner of disposition, and 'sold' and 'sale' have corresponding meanings.
- (2) When an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he

had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

15. Section 55 of the Act provides that where a business, or part of a business, is sold, leased transferred or otherwise disposed of, the successor employer is bound by the collective bargaining obligations of the predecessor. The expensive definition of the term “sells” contained in section 55 underscores the purpose of the section. The section is designed to preserve bargaining rights regardless of the legal form of the transaction where the predecessor’s business, or any part thereof, for which the union holds bargaining rights is transferred to a successor. (See *Thorco Manufacturing Ltd.* 65 CLLC ¶16,052. The section is designed to protect bargaining rights in the face of transactions motivated by a desire to undermine or circumvent bargaining rights. Equally important, the section operates without regard to motive to preserve bargaining rights where the sale of a business has occurred. With reference to this second purpose, the Board stated in *More Groceteria Limited*, [1980] OLRB Rep. April 486, at 492:

“...the latter function of the section providing some permanence to collective bargaining rights — is often the most difficult to apply. Here the Legislature has determined that the objectives of labour relations policies require that the rightful prerogatives of owners independently to rearrange their business and even eliminate themselves as employers be balanced by protection to the employees from a sudden change in the employment relationship. Indeed, the transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees and their representatives are assured of some real measure of continuity in the collective bargaining process by operation of law. ...”

(See also *Aircraft Metal Specialists Ltd.* [1970] OLRB Rep. Sept. 702.)

16. The issue before the Board is whether or not the sale of part of a business within the meaning of section 55 has occurred so that the bargaining rights of the applicant trade union which attach to that part of the alleged predecessor’s business are preserved. There is no doubt that a “sale” within the meaning of section 55(1)(b) has taken place. The difficulty lies in determining whether a sale of a business or part thereof, as distinct from a sale of assets or something other than a business, has taken place.

17. There is no expansive definition of the term “business” in section 55 of the Act. The Act simply provides that a business includes a part or parts thereof. Given the scope of the Board’s jurisdiction in labour relations matters, it is not surprising that the Board has been given a discretion to make the determination on a case-by-case basis. Generally speaking, a business is an aggregation of assets, goodwill, management and labour organized in such a way as to produce a marketable product or service and thereby to generate a profit for its owners and employment for its workers. From a labour relations perspective, the most important aspect of a business is its capacity to provide employment. Having regard to the

purpose of section 55, it follows that under the section the Board seeks to determine if the elements of the predecessor's business which support employment have been passed from predecessor to successor. A comparison of the nature of the work performed before and after the transaction is usually a reliable indicator in this regard. However, the Board will also look to the transfer of plant and facilities, goodwill, customer lists, outstanding contracts, trademarks and logos, location and managerial skills in deciding if the predecessor's business has been passed to the successor in any given case.

18. The Board follows the same approach in deciding if the sale of part of a business within the meaning of section 55 has occurred. The Board attempts to ascertain if the essential elements of a segment of the alleged predecessor's business have passed to the alleged successor. The cases in which the Board has been called upon to decide if a sale of part of a business has occurred are reviewed in *Beef Terminal (1979) Limited*, [1980] OLRB Rep. Aug. 1167. The Board summarizes the import of these cases at para. 22 of that decision as follows:

"In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization — managerial or employee skills, plant, equipment 'knowhow' or goodwill — thereby allowing the successor to perform the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. In all of these cases there was a transfer of a distinct part of the predecessor's configuration of assets and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of the employee complement; and, but for section 55 the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied."

(See also *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193 at paras. 33 and 34.

19. Did the alleged successor in this case obtain a part of the predecessor's business as would cause section 55 to operate? The answer is to be found in an examination of the two business organizations which existed prior to the transaction. In most section 55 applications, whether involving the alleged sale of the whole business or a part thereof, the nature of the alleged predecessor's business organization provides the ultimate answer. The Board identifies its essential elements and determines if sufficient of these have been transferred to the successor as to allow the business and the employment which it generates to continue. See *Thunder Bay Ambulance Service*, [1978] OLRB Rep. May 467 and *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691. However, if as in *Canada Cement Lefarge*, [1977] OLRB Rep. Jan. 5, and *Darrigo Consolidated Holdings*, [1980] OLRB Rep. Jan. 29, assets have been disposed of which are peripheral or unrelated to the business organization to which

the bargaining rights at issue attach, the Board will not find that there has been a sale of a business within the meaning of the section.

20. The exercise becomes more complicated where, as in this case, the alleged successor has carried on a parallel business. Where the alleged successor has carried on a parallel business the result of the transaction may as easily be an expansion or alteration of his business as the transfer of the alleged predecessor's business. An employment opportunity which flows from an expansion or alteration of the business carried on by the alleged successor prior to the section 55 transaction does not trigger the operation of the section. The union's bargaining rights attach to the predecessor's business and their preservation is contingent upon a transfer and continuation of that business.

21. The Board has dealt with section 55 applications where the alleged successor has carried on a parallel business prior to the section 55 transaction in a number of recent decisions. In *Norjohn Contracting Limited*, [1978] OLRB Rep. May 438, Norjohn, a company in the paving and surface treatment business, purchased the shares of a competitor company and caused the sale to it of the competitor's emulsion plant and allied equipment and supplies. The transaction did not include the acquisition of customers' lists, accounts receivable or sales contracts. There was no transfer of goodwill. Norjohn's manning was adequate to provide for its expected business volume so that it did not have to hire any additional employees as a result of the transaction. The Board commented that "if Norjohn has been successful by means of this transaction in protecting its market in this manner, this is still not proof of a continuation of Law's business under Norjohn's ownership". The Board concluded that the competitor's business had not passed to the alleged successor who operated a parallel business prior to the sale. In *Dominion Stores Limited*, [1979] OLRB Rep. July 626, Dominion Stores moved to premises previously occupied by a competitor which had been vacated 5 months before. In separate transactions Dominion acquired a lease to the premises and many of the fixtures which had been used by the competitor. Dominion had operated from other premises in the immediate vicinity. It closed these premises on a Saturday and opened for business at the new premises on the following Monday. The employees of Dominion who had worked at the old premises were transferred to the new. The Board, in dismissing the application by the union which had held bargaining rights in respect of the alleged predecessor's employees, characterized the transactions "as undertakings in conjunction with the transfer of an existing business and not undertakings in conjunction with the purchase of the predecessor's business." In *British American Bank Note Company Limited*, [1979] OLRB Rep. Feb. 72, the British American Bank Note Company transferred two of its eighteen presses to a wholly owned subsidiary. The subsidiary was engaged in the printing of Wintario tickets. The Board, in dismissing the application, commented that both companies were engaging in similar, but parallel, businesses before the two presses were removed and further, that the Wintario work was obtained through the business efforts of the subsidiary. The Board concluded that the loss of work at British American Bank Note Company did not appear to flow from the sale of part of its business but from a decision of the subsidiary to do all of the Wintario work.

22. These cases illustrate the attention which must be paid to the nature and scope of the alleged successor's business where the successor carries on a parallel or like business prior to the section 55 transaction. The bargaining rights which are to be preserved under section 55 attach to the predecessor's business and it is the predecessor's business, or a part thereof, which must be transferred. If the transaction is one carried out in connection with the operation of a

parallel business and if the business entity which results can more properly be described as having its roots in the alleged successor's business than in the alleged predecessor's business, it is unlikely that a sale of business within the meaning of section 55 has taken place.

23. In the instant case K-W Blair and Grand Valley carried on parallel businesses within the township of Brantford; at least in the period 1976-77. Grand Valley commenced to operate a ready-mix business from a single plant in the township of Brantford in 1976. The company achieved a dominant position in the local market thanks in large measure to the expertise and entrepreneurial initiative of Messrs. Gedney and Tysoski. Notwithstanding the financial difficulties experienced by Grand Valley in 1979, the company maintained its share of the market and maintained a constant level of employment up to and following the sale of the majority interest to Carter. It was through the sale of the majority interest to Carter that Grand Valley was able to acquire the capitalization necessary to continue its business. We are satisfied that following the sale of the majority interest to Carter Grand Valley continued to operate as a separate business under its own name, from its own premises and under the day-to-day direction of Messrs. Gedney and Tysoski. Grand Valley continued to employ those who had been with it prior to the transaction. The transaction brought K-W Blair and Grand Valley under common control and direction but the two companies continued to operate as separate entities.

24. K-W Blair constructed a plant to serve the Brantford area at about the same time that Grand Valley came into existence. The business carried on by K-W Blair for its Paris plant in the period 1976-77 was a relatively small part of an integrated ready-mix business carried on from plants in Kitchener, Cambridge, Waterloo and Paris. Subsequent to November, 1977, the business carried on by K-W Blair from its Paris plant can best be characterized as incidental to its ready-mix business. Because of its inability to attract customers and secure jobs in the Brantford area, the company removed its trucks and the employees who were working there in November, 1977. The company continued to operate its ready-mix business from its other plants and clearly, from November, 1977, the employment of those covered by the scope of the Teamsters' recognition has emanated from these other locations. The Teamsters have not represented a single employee working out of the Paris location since November, 1977, some 18 months before the sale of the Paris plant to Grand Valley.

25. A close corporate connection may sometimes support the inference that a transaction has been designed to circumvent bargaining rights. We are unable to draw such an inference in respect of the transaction by which Grand Valley acquired K-W Blair's Paris plant. If the K-W Blair Paris plant had been a going concern at the time Carter acquired control of Grand Valley and if, after acquiring control, Carter had caused the K-W Blair's plant to be closed and had then moved in Grand Valley and its CLAC represented employees, an inference could be drawn that Carter was attempting to rid K-W Blair's Paris operation of the applicant trade union. However, K-W Blair's Paris plant ceased to be a base of operation eighteen months prior to the time Carter gained control of Grand Valley. K-W Blair had an opportunity to crack the Brantford market through its Paris plant but failed. Grand Valley was a going concern at the time and there is no evidence to link Carter and Grand Valley at the time Carter closed the Paris plant of K-W Blair. Indeed, the financial difficulties encountered by Grand Valley did not surface until well after K-W Blair had closed its Paris plant as a base of operations. In these circumstances we are unable to draw the inference that the transactions by which Carter gained control of Grand Valley and then sold K-W Blair's Paris plant to Grand Valley were designed to undermine the Teamsters' bargaining rights. The Teamsters

continue to represent the employees of K-W Blair who are employed in its ready-mix business.

26. As has been discussed, section 55 also operates without regard to motive to preserve bargaining rights where there has been a sale of a business or a part thereof. However, in this case we are unable to conclude that there has been a transfer of a part of K-W Blair's business to Grand Valley. K-W Blair disposed of assets which were at best incidental to its business and had been for some 2 years. The location of a ready-mix plant is not determinative as is often the case in the sale of a retail food business. K-W Blair did not dispose of any of the essential elements of its business which combined to support the employment of the employees represented by the applicant trade union. Grand Valley, on the other hand, continued as a viable business operation in the Brantford area throughout the relevant period. It did so on the basis of the knowledge and goodwill of Messrs. Tysoski and Gedney, the efforts of its employees, and, in the period subsequent to May, 1979, the capital provided by Carter. When reference is had to the nature of the two business operations immediately prior to and the nature of the business operations which emerged following the alleged section 55 transaction, we are satisfied that the transaction was made for the genuine business purpose of improving Grand Valley's operation and that it was Grand Valley's business which continued after the transaction.

27. Grand Valley purchased from K-W Blair assets which were essentially idle for use in its business. Grand Valley's business continued to operate under the name of Grand Valley, with the same persons in day-to-day control and with the same employees. There was no transfer of any of the elements of K-W Blair's business which supported the employment of those represented by the applicant union. The business entity which emerged is rooted in the parallel business of Grand Valley carried on prior to the transaction and accordingly, we must conclude that a sale of a business within the meaning of section 55, as would preserve the applicant's bargaining rights, has not taken place.

28. The application is hereby dismissed.

0395-81-M Sheet Metal Workers' International Association Union, Local 537, Applicant, v. **Hamilton and District Sheet Metal Contractors Inc.**, Brantford and District Sheet Metal Contractors Inc., Mechanical Contractors Association—Niagara, and Ontario Sheet Metal and Air Handling Group, Respondents.

Collective Agreement-Section 112a-Grievance alleging non-payment of welfare and pension contributions to apprentices-Board discussing and applying principles of collective agreement interpretation

BEFORE: R. D. Howe, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

APPEARANCES: *Stanley Simpson and George Ward for the applicant; T. K. Billings, Lou Cianfarani and M. Addario for the respondent Ontario Sheet Metal and Air Handling Group; No one appearing for the other respondents.*

DECISION OF THE BOARD; June 19, 1981

1. This is a referral of the following grievance to the Board pursuant to section 112a of *The Labour Relations Act*:

"GRIEVANCE

The union grieves failure of the employers to pay apprentices, welfare and pension contributions in accordance with the provisions of the collective agreement namely Article 15. More particularly the employers are paying only a percentage of pension and welfare fund contributions for apprentices instead of paying the apprentices the whole amount as set out in the agreement to which the apprentices are entitled. The union requests that the employers pay the total amounts as provided by the collective agreement to all apprentices employed by them effective May 1st, 1981 and thereafter during the term of the agreement.

DATED at Hamilton this 15th day of May, 1981."

2. Article 27 of the 1980-1982 Provincial Collective Agreement by which the parties to this referral are bound, provides in part as follows:

"ARTICLE 27 — WAGES — GENERAL

Refer to Clause 15 of Local Appendices

**HOURLY RATE, VACATION PAY,
EMPLOYER'S CONTRIBUTIONS**

27.1. The minimum hourly rate, vacation pay and employer's contributions for duly qualified members and registered apprentices covered by the terms of this Agreement when employed by the employer in the shop or on the job, within the geographic scope of the various

Appendices, to perform any work specified and/or included in the jurisdictional claims of the Sheet Metal Workers' International Association and/or the jurisdictional awards of the Impartial Jurisdictional Disputes Board for the Construction Industry shall be as set out in the respective Appendices.

27.2 APPENDICES

As set out in Clause 15 of Local Appendices."

3. Appendix "B" of the Collective Agreement is the Appendix which is applicable to the present grievance. Included in Clause 15 of that Appendix, which pertains to the Hamilton area, Brantford Area and Niagara Peninsula area, are the following provisions:

"CLAUSE 15 — WAGES

Refer to Article 27 Body of Agreement

15.1 JOURNEYMEN

The minimum rate of wages for certified journeymen, qualified sheet metal workers and welders when employed in the shop or on the job by the employer to perform any work specified in Clause 19 of this Appendix, unless otherwise provided for in this Agreement shall be:

Hamilton Area:

Effective Date	Base	Vac. Pay	Welfare	Spec. Dues Fund	* OCTF.
May 1/80	\$14.03	10%	\$.60	\$.05	\$.01
Nov 1/80	14.16	10%	.70	.05	.01
May 1/81	15.30	10%	.70	.05	.01

Should the Welfare contributions change, then the above will be adjusted accordingly with the exception of the total wage package.

Niagara Peninsula Area:

Effective Date	Base	Vac. Pay	Welfare	Spec. Dues Fund	* OCTF.
May 1/80	\$14.21	10%	\$.60	\$.05	\$.01
Nov 1/80	14.35	10%	.70	.05	.01
May 1/81	15.48	10%	.70	.05	.01

Should the Welfare contributions change, then the above will be adjusted accordingly with the exception of the total wage package.

Brantford:

Effective Date	Base	Vac. Pay.	Welfare	Spec. Dues Fund	* OCTF
May 1/80	\$13.61	10%	\$.60	\$.05	\$.01
Nov 1/80	13.75	10%	.70	.05	.01
May 1/81	14.88	10%	.70	.05	.01

Should the Welfare contributions change, then the above will be adjusted accordingly with the exception of the total wage package.

*OCTF see Article 34 Body of Agreement."

[The minimum "sheeting and decking" rates are also specified in a table contained in Clause 15.1.]

"APPRENTICES

The percentage of the apprentice's wages according to the Apprenticeship and Tradesmen's Qualifications Act will be calculated on the basis of the wage rate for the sheet metal journeymen, to which the Pension and Welfare fund contribution will be added. The actual full contribution to the Pension and Welfare Fund for the apprentice will then be deducted from the aforementioned total and the remainder constitutes the apprentice's gross wages.

...

15.3 The employer agrees that if a pension plan is established during the life of this Agreement and agreed upon by the trustee such monies required for this plan will be deducted from the wage rate."

Clause 18 of Appendix "B" provides:

"CLAUSE 18 — TRUST FUNDS

18.1 Welfare Fund

Contributions shall be made to a Welfare Fund by the employers covered by this Agreement on behalf of any employee who comes under the jurisdiction of the local union. Such contributions shall be made at the rate established in Clause 15 hereof for every hour worked by an employee and shall be used to provide health and welfare benefits for all eligible employees and their eligible dependents. It is agreed to increase these contributions on the request of the local union. The increase will be deducted from the wages. The Welfare Fund and plan benefits shall be governed by the Board of Trustees of the Welfare Fund and the Administrator, Local 537 Funds Administrators Inc. appointed by them. The employers agree to the terms, provisions and conditions as set out in

the Trust Agreement concluded with the local trade association in July, 1970, the local union and the Board of Trustees of the Welfare Fund establishing the Welfare Fund as the same may be amended from time to time.”

4. Section 10(1) of Regulation 33 (R.R.O. 1970, as amended) under *The Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1970, c. 24, as amended provides:

“Unless otherwise prescribed, the rate of wages for an apprentice whether for his regular daily hours or for hours in excess of his regular daily hours shall be not less than,

- (a) 40 per cent during the first period;
- (b) 50 per cent during the second period;
- (c) 60 per cent during the third period;
- (d) 70 per cent during the fourth period; and
- (e) 80 per cent during the fifth period,

of the average rate for journeymen employed by the employer in that trade, or where the employer is the only journeyman employed, of the average rate of wages for journeymen in the area.”

5. Although the grievance refers to “Article 15” it was common ground among the parties that what is in issue in these proceedings is the proper interpretation of the apprentices provision contained in Clause 15.1 of Appendix “B” (hereinafter referred to as “Clause 15.1”) as set forth above.

6. Counsel for the applicant initially indicated that he intended to adduce extrinsic evidence with respect to the manner in which the parties have interpreted the apprentices provision in Clause 15, as (in his submission) that Clause contained a latent ambiguity. However, during the course of argument concerning the admissibility of such evidence, counsel advised the Board that he was prepared to argue that the provision was unambiguous and that accordingly, he would not be attempting to introduce extrinsic evidence.

7. The applicant contends that Clause 15.1 requires the employer of an apprentice to pay the full Pension and Welfare Fund contribution specified for sheet metal journeymen in Clause 15.1. (No pension contribution is specified in Clause 15.1 since no pension plan had been established for the areas covered by Appendix “B” as of May 1, 1980, for the effective date of the Collective Agreement. However, it appears that a pension plan is in the process of being established for those areas, as contemplated by Clause 15.3 and that a contribution of \$.75 will be required for that plan.) It is the applicant's submission that the apprentices provision in Clause 15.1 dictates that the sheet metal journeyman rate be multiplied by the applicable percentage specified in the aforementioned Regulation, and that the (journeyman) Pension and Welfare Fund contribution then be added to the product obtained by the initial

calculation. That Pension and Welfare Plan contribution is then to be deducted from that sum (it is argued) to determine the apprentice's gross wages. Under that interpretation (if it is assumed for purposes of simplicity that there is no pension plan contribution) effective May 1, 1981, an apprentice in his first period in the Hamilton area would be entitled to gross wages of:

$$40\% \text{ of } \$15.30 + \$.70 - \$.70 = \$6.12.$$

8. In support of his position, counsel for the applicant drew the Board's attention to the comma between "journeyman" and "to which", and submitted that the comma "gramatically means that something new is happening". He also contends that the word "which" refers to the wage that has been determined for the apprentice by applying the appropriate percentage of the journeyman's wage rate. It was his position that the purpose of the second sentence in that provision is "to indicate what are wages and what are contributions to the Pension and Welfare Fund". He suggested that a question might arise as to what constitutes "gross wages" and that, accordingly, the answer to that question has been clearly indicated in the apprentices provision. He mentioned "income tax implications" as an example of how such question might arise. In his reply argument, he noted that vacation pay is calculated on the basis of an employee's "gross wages", as indicated by Clause 16 of Appendix "B", which provides:

"CLAUSE 16 — VACATION AND HOLIDAY PAY

Refer to Article 31 Body of Agreement

16.1 Vacation pay shall be paid at the rate of 10% of an employee's gross wages; such wages shall not include contributions on behalf of such employee to the pension (if any), Welfare or Industry Funds and the employer agrees to deduct income tax from the employee's gross wages in respect of any vacation pay contributions submitted on his behalf. The vacation pay period shall be from June 1st to May 31st."

His explanation for the inclusion of the adjectives "actual full" in the second sentence of the apprentices provision in Clause 15.1 was that those words merely reflect the fact that Clause 15 contemplates that the Welfare contributions may change during the term of the Collective Agreement, and that a pension plan may be established during the life of the Agreement so as to require pension plan contributions to be made, thereby making the "actual full" contributions different from the "Welfare" contributions specified in the table set forth in Clause 15.1.

9. It was submitted on behalf of the respondent Ontario Sheet Metal and Air Handling Group (hereinafter referred to as the "respondent") that the apprentices provision of Clause 15.1 requires that the Pension and Welfare Plan contribution be added to the sheet metal journeyman wage rate before the appropriate percentage is applied; the actual full Pension and Welfare Plan contribution is then to be deducted to determine the apprentice's gross wages in accordance with the second sentence of the provision. Under the interpretation (if it is again assumed for purposes of simplicity that there is no pension plan contribution) effective May 1, 1981, an apprentice in his first period in the Hamilton area would be entitled to gross wages of:

$$40\% \text{ of } (15.30 + .70) - \$.70 = \$5.70.$$

Counsel contended that the respondent's approach is consistent with the concept embodied in *The Apprenticeship and Tradesmen's Qualifications Act* by which apprentices receive a percentage of the journeyman's rate, which percentage increases as they gain experience. He further submitted that it is consistent with the construction industry practice of negotiating a "total wage package."

10. The respondent filed with the Board two calculation sheets. One of those documents detailed the "pension fund adjustment" as follows:

**"1980-1982 SHEET METAL PROVINCIAL
COLLECTIVE AGREEMENT**

Appendix 'B' — Hamilton, Clause 15
Adjustment for Pension Fund of 75¢
effective May 1, 1981

Journeyman:

	As per Agreement	Adjusted
Base	\$15.30	\$14.62
V.P. 10%	<u>1.53</u>	<u>1.46</u>
	\$16.83	\$16.08
Welfare	.70	.70
Pension	-	.75
Dues Fund	.05	.05
O.C.T.F.	<u>.01</u>	<u>.01</u>
Total Package	<u>\$17.59</u>	<u>\$17.59"</u>

Thus, the \$.75 pension plan contribution is derived from the base rate (which is reduced by \$.68) and from vacation pay (which is reduced by \$.07). Counsel for the applicant appeared to question the legitimacy of this approach as he stated in reply that he did not see where that formula was indicated anywhere in the Collective Agreement. Clause 15.3 indicates that if a pension plan is established during the life of the Collective Agreement, the contributions to the plan "will be deducted from the wage rate". Although that provision, if read in isolation, might be construed to require the pension plan contribution to be deducted from the employee's base rate, the Board is of the view that when it is read together with the other provisions in the Appendix and in the body of the Collective Agreement, it justifies the approach adopted by the respondent. In Clause 18.1 (as quoted above) the parties have agreed that any increase in Welfare Fund contributions by an employer at the request of the local union "will be deducted from the wages". It is evident from the sentence which is repeated after each of the three "Area" tables of sheet metal journeymen's rates in Clause 15.1 (namely: "Should the Welfare contributions change, then the above will be adjusted accordingly with the exception of the total wage package") that the parties intended any such increase in contributions to be deducted by adjusting the minimum rate in such manner that the reduction in that rate plus the concomitant reduction in vacation pay would equal the increase in contributions, since deducting from the base rate the full amount of the increase in contributions would result in a decrease in the total wage package. (For example, if the welfare contribution was increased by

\$.75 and that full increase was deducted from the base rate, the vacation pay decrease of \$.07 (or \$.08 depending on whether the 7½¢ was rounded off upward or downward) that would accompany such reduction would result in a total reduction of \$.82 (or \$.83) in wages and vacation pay. Thus, the "total wage package" would be reduced by \$.07 (or \$.08). Although the term used by the parties in Clause 15.3 (with respect to pension plan contributions) is "wage rate" rather than the term "wages" (which they used in Clause 18.1 with respect to Welfare Fund contributions), the Board is of the view that this minor difference in terminology does not evince an intent on the part of the parties that pension plan contributions introduced during the term of the Collective Agreement at the request of the union, should be treated in a manner which differs from the approach which the parties have agreed should be applied to increases in Welfare Fund contributions implemented during the term of the Collective Agreement at the request of the union.

11. The other calculation sheet filed with the Board provides the following example of what the respondent contends to be the appropriate manner of calculating an apprentice's gross wages based on the application of Clause 15.1 to the adjusted journeyman's "wage rate" (i.e., the "wage rate" (of \$15.30) adjusted as set forth above (to \$14.62) to reflect the pension contribution of \$.75):

"Hamilton

Apprentices:

Example based on provisions of Clause 15.1, page B-13

Journeyman's wage rate	\$14.62 +
O.C.T.F	.01
Welfare	.70
Pension	.75
Total	<u>\$16.08</u>

Apprentice's rate =	
40% of \$16.08	\$ 6.43 -
O.C.T.F.	.01
Welfare	.70
Pension	<u>.75</u>

Apprentice's Gross Wages	<u><u>\$ 4.97</u></u>
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<u>1st Period</u> <u>40%</u>	<u>2nd Period</u> <u>50%</u>	<u>3rd Period</u> <u>60%</u>	<u>4th Period</u> <u>70%</u>	<u>5th Period</u> <u>80%</u>
\$4.97	\$6.58	\$8.19	\$9.80	\$11.40

All contributions for apprentices are the same as for journeymen".

12. Article 34 of the Collective Agreement provides for an Ontario Sheet Metal Workers' Conference Promotion Trust Fund ("O.C.T.F."). Article 34.1 provides:

"ARTICLE 34 — TRUST FUND — ONTARIO
SHEET METAL WORKERS'
CONFERENCE PROMOTION
TRUST FUND

34.1 Each employer shall deduct from each employee the sum of \$.01 for each hour worked or part thereof and remit said amount to the administrator of the local union's Trust Funds in the same manner outlined in the Clause governing Trust Funds in the Appendix for the relevant area."

It is clear that this provision applies to apprentices because under Article 2.6, "‘employee’ means a certified journeyman sheet metal worker or registered apprentice . . .". Counsel for the respondent advised the Board that when the parties prepared for the Collective Agreement and Schedule "B", all base rates were reduced by \$.01 to offset the contribution of the O.C.T.F. in accordance with Article 34.1. (The accuracy of that statement was not disputed by counsel for the applicant.) Thus, he explained that \$.01 had to be "added back in" to obtain the "true" base rate.

13. It is the task of the Board, in interpreting a collective agreement (and an appendix which forms part of that agreement) in a section 112a referral, to discover the intention of the parties. Generally, that intention must be determined from the document itself (although resort to other sources, such as extrinsic evidence in case of ambiguity, is appropriate in some cases). Although the apprenticeship provision contained in Clause 15.1, which gave rise to the present grievance, is not a model of precision and clarity of expression, the probable intention of the parties can be discerned from the language of that provision when considered in the context of the Collective Agreement as a whole.

14. It was common ground among the parties that the words "wage rate" in the apprentices provision refer to the sheet metal journeyman "base" as set forth in the tables in Clause 15.1. While the inclusion of the comma (in the first sentence of the provision) before the words "to which the Pension and Welfare Fund contribution will be added", and the use of the word "total" (rather than the term "product") in the second sentence of that provision, lend some support to the position of the applicant, the use of the words "actual full" to describe the "contribution" which is to be deducted buttresses the respondent's interpretation of the provision.

15. It is a well known rule of construction that words in documents such as a collective agreement are to be interpreted so as to give each word some meaning. As noted in Palmer, *Collective Agreement Arbitration in Canada* (Toronto: Butterworths, 1978) at 101-2, "[t]his rule has been expressed as follows [in *Re DeHavilland Aircraft* (1961), 11 L.A.C. 350, at 352 (Laskin)]:

‘It is a recognized canon of construction that in interpreting documents

they should be construed so as to give effect to every word, and a word should not be disregarded if some reasonable meaning can be given to it. It has further been held that it is a good general rule that one who reads a legal document, whether public or private, should not be prompt to ascribe—should not without necessity or some sound reason—impute to its language, tautology or superfluity.’

See also *Re Hydro Electric Power Commission of Ontario* (1973), 4 L.A.C. (2d), at 279 (Brandt), in which the majority (in attempting to determine the meaning of the phrase “legal fees actually incurred in the buying of a new residence”) stated:

“Initially we would observe that the word “actual” inserted into the phrases does not, at first glance, add a great deal to the section. If the word were deleted so that the section concerned itself with ‘legal fees incurred in the buying of a new residence’, it is difficult to see what, if any, change has been produced in the agreement. However, it is a cardinal rule of construction that the parties must be presumed to have intended that their language have some effect and consequently some attempt must be made at assigning a meaning to the word ‘actually’ as it appears in the agreement.”

16. The interpretation advocated by the applicant renders superfluous the words “actual full”. Under the applicant’s interpretation, the employer adds the Pension and Welfare Fund contribution to the apprentice’s wage rate and then subtracts the same Pension and Welfare Fund contribution. Although as indicated above, counsel for the applicant argued that the inclusion of the words “actual full” in the second sentence merely reflects the fact that the amount of the Pension and Welfare Fund contribution may be increased from time to time during the term of the Collective Agreement at the request of the union, that argument would only be cogent if the Board were of the view that the parties intended the apprentices provision of Clause 15.1 to be utilized to determine the effect which such an increase would have on an apprentice’s wages. However, for reasons set forth below, the Board is of the view that the parties intended the effect which such an increase would have on an apprentice’s wages to be determined directly by the application of Clause 15.3 (in the case of the introduction of a pension plan contribution) or Clause 18.1 (in the case of an increase in the Welfare Fund contribution at the request of the union), rather than indirectly through the application of the apprentices provision in Clause 15.1.

17. Under the respondent’s interpretation of the provision, however, the words “actual full” are given meaning. The application of the appropriate percentage to the total obtained by adding the (sheet metal journeyman’s) Pension and Welfare Fund contribution to the sheet metal journeyman’s (base) wage rate results in a sum composed of two parts, namely, the reduced wage rate and the reduced contribution to the Fund. If the second sentence of the provision merely stated that the “contribution to the Pension and Welfare Fund” for the apprentice would then be deducted, it would be unclear whether the amount to be deducted would be the full contribution (equivalent to that paid for a journeyman) or the reduced contribution. The words “actual full” clarify the situation by indicating that the “actual” sum remitted by the employer on behalf of the apprentice is to be deducted, and that the sum to be remitted is the “full contribution”, i.e., the full amount which would be remitted on behalf of a sheet metal journeyman. Thus, the effect of the apprentices provision is to require the

employer to pay out of its own funds only the applicable percentage of the contribution specified in the table; the balance of the contribution specified in the table comes out of the apprentice's wages.

18. The applicant's position concerning the purpose of the final sentence in the apprentice's provision in Clause 15.1 might be somewhat more compelling if there were no provision in the body of the Collective Agreement or in the Appendix concerning whether contributions are to be considered as part of "gross wages" for the purposes of calculating vacation pay. However, Clause 16.1 clearly specifies that "an employee's gross wages . . . shall not include contributions on behalf of such employee to the pension (if any), Welfare or Industry Funds". Thus, the provisions of Clause 16.1 render the full sentence of the apprentice's provision of Clause 15.1 mere surplusage on the applicant's construction of that provision. Under the interpretation supported by the applicant, the employer would be required by the provision in question to engage in a rather senseless arithmetic exercise of adding the Pension and Welfare Fund contribution to the apprentice's wage rate and then immediately subtracting that contribution, so as to end up with the apprentice's wage rate with which he originally began. Thus, the interpretation which the applicant urges the Board to adopt strips the provision of any real effectiveness. As stated in Palmer, *Collective Agreement Arbitration in Canada, supra*, at 100, "if one of two equally plausible meanings would strip a clause of any real effectiveness, it will be avoided".

19. For the foregoing, the Board concludes that the apprentices provision of Clause 15.1 requires that the Pension and Welfare Fund contribution specified in the applicable sheet metal journeyman table in that Clause be added to the applicable sheet metal journeyman (base) wage rate, and that the appropriate percentage from Regulation 33 (R.R.O. 1970, as am.) be applied to that total. The actual full Pension and Welfare Plan contribution specified in the table is then to be deducted to determine the apprentice's gross wages. Thus, in the absence of pension plan contribution, effective May 1, 1981, an apprentice in his first period in the Hamilton area would be entitled to gross wages of:

$$40\% \text{ of } (\$15.30 + .70) - \$.70 = \$5.70.$$

20. As indicated by the calculation sheets filed with the Board, it is the respondent's position that the effect on an apprentice's wages of the introduction of a pension plan contribution is to be determined by applying the apprentices clause. However, the application of that clause in such circumstances gives rise to an anomalous result in that it effects a reduction in the apprentice's total wage package. For example, if the apprentice's clause is applicable, the introduction of a \$.75 pension plan contribution results in gross wages of \$4.98 (with vacation pay of \$.50) for an apprentice in his first period in the Hamilton area effective May 1, 1981 (i.e., $40\% \text{ of } (\$14.62 + \$1.45) - \$1.45 = \4.98). However, as indicated above, in the absence of a \$.75 pension plan contribution, such apprentice would be entitled to gross wages of \$5.70 (with vacation pay of \$.57). Thus, if the apprentices clause is applicable, the introduction of a \$.75 pension plan contribution will reduce such apprentice's total wage package by \$.04 (since his gross wages and vacation pay have been reduced by a total of \$.79 (i.e., $(\$5.70 + .57) - (\$4.98 + .50) = \$.79$) even though his pension plan contribution is only \$.75). This anomalous and inequitable result, which is inconsistent with the intention of the parties (as discussed above) that pension plan contributions introduced during the term of the Collective Agreement would not effect the total wage package, is avoided if the effect of the introduction of a pension plan contribution is determined directly by applying Clause 15.3 to

the apprentice, rather than indirectly by applying the apprentices provision to the journeyman's reduced wage rate (i.e., the journeyman's wage rate as reduced by the application of Clause 15.3). The direct application of Clause 15.3 in the manner discussed above (in paragraph 10) results in the apprentice (who, as indicated above, would be entitled to gross wages of \$5.70 effective May 1, 1981, in the absence of a pension plan contribution) being entitled to gross wages of \$5.02 (i.e., \$5.70 - \$.68). That \$.68 reduction in gross wages combined with the accompanying reduction in vacation pay of \$.07 (i.e., 10% of \$.68) yields a total of \$.75, which is the exact equivalent of the pension plan contribution. Thus, under that approach, the apprentice's total wage package remains unchanged. Accordingly, the Board rules that Clause 15.3, as a specific provision concerning the manner in which monies for pension plan contributions are to be obtained in the event that a pension plan is established during the life of the Collective Agreement, take precedence over the apprentices provision in Article 15.1, which is a general provision that avoids the necessity of including in the Appendix extensive tables with respect to apprentices by providing a formula by which an apprentice's gross wages can be a formula by which an apprentice's gross wages can be determined in normal circumstances from the rates specified in the tables pertaining to sheet metal journeyman (see Brown and Beatty, *Canadian Labour Arbitration* (Agincourt: Canada Law Book Limited, 1977) at 159).

21. It is unclear from the information provided to the Board by the parties whether or not the \$.75 pension plan contribution was in fact implemented effective May 1, 1981 as the first calculation sheet quoted above appears to suggest. If it was implemented in the manner set forth in the other information sheet quoted above, then the respondent has been miscalculating apprentices wages since May 1, 1981, by determining the effect thereon of the introduction of a pension plan contribution by applying the apprentices provision in Clause 15.1 to the journeyman's reduced wage rate, rather than by applying Clause 15.3 directly to apprentices in the manner set forth in the preceding paragraph of this decision. If, on the other hand, the pension plan contribution was not implemented on May 1, 1981, or at any other time prior to the date of the grievance (May 15, 1981), then the information before the Board does not disclose any violation of the Collective Agreement.

22. The applicant sought leave of the Board to amend the grievance so as to substitute "May 1, 1980" for "May 1, 1981". However, in view of the Board's determination that any violation of the Collective Agreement disclosed by the information before the Board occurred on or after May 1, 1981, it is unnecessary for the Board to deal with that request.

23. The Board retains jurisdiction in the event of any dispute over the implementation of this decision.

2668-80-M The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Hurlenco Limited**, Respondent, v. The Association of Millwrighting Contractors of Ontario, Intervener.

Practice and Procedure-Section 112a-Whether referral untimely-Whether applicant estopped by settlement-Whether Board extending time limits of grievance procedure

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. Kobryn and J. Wilson.

***APPEARANCES:** David McKee, John Williams and Ted Koosel for the applicant; G. Weir, Jorunn H. Hurlen and Lars A. Hurlen for the respondent; G. Weir and Fred Beldham for the intervener.*

DECISION OF THE BOARD; June 11, 1981

1. The name of the respondent is amended to read: "Hurlenco Limited".
2. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 112a of *The Labour Relations Act*. At the hearing into this matter held June 9th, 1981, in Thunder Bay, Ontario, the Board rendered the following decision orally.
 - (a) The respondent has raised two preliminary objections to the hearing of this referral. Its objections are that the referral is untimely and, in any event, the applicant is estopped from making the referral because the parties had reached an agreed settlement of this matter.
 - (b) The Board will deal first with the allegation that the referral is untimely and certain facts in that respect are agreed by the parties. These are:
 - (i) At all material times they were bound to the provincial agreement between the Association of Millwrighting Contractors of Ontario and the applicant which expires April 30, 1982.
 - (b) The grievor, John Williams, was hired by Hurlenco Limited on September 23, 1980 by referral from the hiring hall of Local Union 1669, a constituent local union of the applicant.
 - (iii) Williams was dismissed by Hurlenco Limited on Friday, September 26, 1980.
 - (iv) The project for which Williams was hired was completed insofar as Hurlenco Limited's work was concerned by December 14, 1980.
 - (v) No formal grievance was filed by the applicant or its agents until February 19, 1981.
 - (vi) The referral to the Board was made March 6, 1981.

- (c) Having regard to the evidence of the witnesses called by the parties at the hearing into this matter the Board finds the following additional facts:
- (i) Ted Koosel, who was office supervisor for Local Union 1669 at the time of Williams' discharge, was advised on September 26, 1980 of the discharge. On or about September 30th, Koosel advised Hurlenco Limited that the discharge was not justified.
 - (ii) Between September 30th and October 7th there was discussions between Koosel and Hurlenco Limited which Hurlenco Limited contends led to an agreed settlement of the dispute and the applicant contends did not because there were certain contingent events which did not transpire.
 - (iii) On October 7th, 1980 Koosel wrote a letter to Ted Ryan, Secretary-Treasurer of the applicant, reporting to him the circumstances of the dispute as Koosel saw them. Koosel testified that by this action he was referring the grievance to Ryan and that he, Koosel, had acted within the limits of his authority to attempt settlement of the dispute at Step One of Article 11 — Grievance Procedure of the provincial agreement by means of his discussions with Hurlenco Limited between September 30th and October 7th.
 - (iv) Koosel did not consider that he had authority to progress the grievance any further and that it was the applicant's responsibility to determine whether to progress it further. In the absence of any evidence from any representative of the applicant, the Board accepts Koosel's view of his authority.
 - (v) On and after October 7th until February 19, 1981, no action was taken to determine this matter by Koosel, Ryan or by anyone else on behalf of the applicant.
 - (vi) Step Two of the grievance procedure in the provincial agreement is equivocal as to who, on behalf of the applicant, has responsibility or authority for the carriage of grievances of that step.
- (d) Subsection 3 of section 112a of the Act which reads as follows sets out the Board's jurisdiction for hearing and determining the difference or allegation raised in the grievance referred to it.

Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

This jurisdiction clearly empowers the Board to deal with any question as to whether the matter is arbitrable.

- (e) Section 37(5a) of the Act, which is also set out below, gives to the Board the same authority as an arbitration board to exercise discretion to extend the time limits under a collective agreement.

Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

The effect of this section allows the Board to adopt the time limits as set out in the provincial agreement in this case and to exercise its discretion to extend those time limits. While the parties hereto are not agreed as to when those limits expired in this matter, they are agreed that they did expire. The applicant's best position is that the October 7th letter activated Step Two of the grievance procedure and that the time limits thereunder expired on or about October 23rd by the applicant's failure to take any further action under the agreement to pursue the grievance. The respondent takes the position that no action has been taken to progress the grievance beyond Step One and that the time limits expired, at the latest, by October 7th. Whichever position the Board adopts, there is a clear need for it to exercise its discretion under section 37(5a).

- (f) In order to exercise its discretion to extend the time limits, the Board must be "... satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.". In the Board's view this requires a careful balancing by it of the two elements of delay and prejudice.
- (g) In so doing it is essential for the Board to keep in mind the purpose of the remedial relief available under section 112a to trade unions and employers in the construction industry. This purpose has been set out clearly by the Board in its decision in *The Lummus Company Canada Limited*, [1976] OLRB Rep. Jan. 980, to be "... to provide a speedy process for resolving disputes arising out of the interpretation of collective agreements negotiated in the construction industry.". As the Board in that case observed, it is "[not] consistent with the aims of the Legislation, however, that a grievor may mangle with impunity in bringing its dispute to a resolve."
- (h) In the case at hand, there can be no doubt that the minimal delay has been from October 23, 1980 to February 19, 1981. There can be no doubt also that neither Local Union 1669 nor the applicant has taken any steps since the October 7th letter until February 19, 1981 to pursue the grievance.

Nor has the applicant, in these circumstances, come forward with any reasons whatsoever for its inaction between those dates. Insofar as prejudice to the respondent is concerned, it would not be reasonable in the Board's view to see the respondent's liability, were the grievance upheld, to extend beyond October 23rd, the date when the applicant contends the time limits under the provincial agreement expired. By itself, this might not be substantial prejudice in the sense contemplated by section 37(5a) of the Act. When, however, the Board weighs both elements together, i.e. delay and prejudice, and having regard for the remedial purpose of section 112a of the Act, the Board is not satisfied that it should exercise its discretion to extend the time limits of the grievance procedure in the provincial agreement and it declines to do so.

- (i) In the result the Board finds that the grievance referred to it in this application is not arbitrable.
 - (j) It is unnecessary, therefore, for the Board to determine the issue of whether the parties had settled this matter by agreement.
 - (k) This application is dismissed.
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0852-79-M; 0853-79-U The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers Local Unions 700, 71, 736, 759, 765 and 786, Applicant, v. The Ontario Erectors Association and **Ins-Co Sarnia Ltd.**, Respondents.

Reconsideration-Section 112a-Whether Board revoking its decision that Local union bound by settlement- Whether settlement has to occur through counsel-Whether applicants other than particular local union may continue proceedings

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members D. B. Archer and J. A. Ronson.

DECISION OF THE BOARD; June 3, 1981

1. Counsel for the Ironworkers District Council of Ontario and International Association of Bridge Structural and Ornamental Ironworkers Local Union 700, 721, 736, 759, 765 and 786 has written to the Board requesting that it reconsider its decision of January 29, 1981 and re-list the matter for hearing. In support of this request counsel has made the following representations:

1. The decision of the Board is based upon a finding that Ironworkers, Local 700 had acted so as to lead Ins-Co to believe that the Ironworkers had authorized Blackwell to act on its behalf as a result of which Ins-Co entered into an agreement with Blackwell affecting the Ironworkers Local 700. There was no evidence before the Board (or cited in the Board's decision) to show that the Ironworkers had held out Blackwell as having authority to act on the Ironworkers behalf in concluding settlement of the 112a Referral except that both matters had been consolidated by the Board and one counsel was acting on behalf of the parties. The only holding out by the Ironworkers was through its common counsel who did not negotiate.

2. The Board in its decision ignored the commonly accepted principle that where parties to proceedings before a Court or administrative tribunal are represented by lawyers or attorneys negotiations for settlement of those proceedings must take place through those attorneys or lawyers in order to bind the principals. In this case, there was no evidence before the Board that Counsel for the Ironworkers and Blackwell participated in the settlement proceedings so as to bind the Ironworkers. In fact, the evidence was contra.

3. In these proceedings, Ironworkers, Local 700 was not the applicant alone in the referral under section 112a of the Act. The other applicants were the Ironworkers District Council of Ontario, Local 721, Local 736, Local 759, Local 765 and Local 786 all of the Ironworkers Unions. Accordingly, we must take it from the Board's decision that those applicants may still continue the Referral under Section 112a, and we

would ask the Board to relist the matter for hearing with respect to those applicants.

2. In reaching its decision of January 29, 1981, the Board looked at a number of considerations other than those referred to in the first portion of counsel's letter. These considerations included the fact that Local 700 had authorized the Sarnia Building and Construction Trades Council to act on its behalf in the section 79 complaint in File No. 0853-79-U, as well as the interrelationship between the section 79 complaint and the various referrals under section 112a, including the referral of Local 700 in File No. 0852-79-M. These and the other considerations taken into account by the Board are referred to in some detail in paragraphs 16 through 19 of the Board's decision of January 29, 1981. We have reviewed these matters and, having done so, remain of the view that Local 700 is bound by the memorandum of settlement dated January 17, 1980. Accordingly, we are not prepared to vary or revoke the Board's decision of January 29, 1981 on the basis of the initial grounds raised in support of the request for reconsideration.

3. With respect to the second grounds put forward in support of the request for reconsideration, we are unaware of any principle to the effect that when a party to proceedings before an administrative tribunal is represented by counsel, any negotiations for settlement must take place through counsel in order to bind the principals. Further, no authorities have been advanced in support of such a principle. This being the case, we are not prepared to reconsider the Board's decision of January 29, 1981 on this basis.

4. We turn now to consider the submission that the Ironworkers District Council and the Ironworkers locals other than Local 700 can continue these proceedings. It is to be noted that the grievance giving rise to these proceedings, which is set out below, indicates that it was filed only on behalf of Local 700:

I am solicitor for Local 700 of the International Ironworkers in connection with the discharge on or about January 20th, 1979, by Ins-Co Sarnia Ltd. of the following grievors:-

Clyde Ayers
Robert Farnsworth
John Forestell
William Haight
Tony Noyroski
Ronald Stratton
Henry Warren
John Warren

Each of the grievors in the circumstances was wrongfully terminated and demands reinstatement with full compensation for all losses of earnings and other benefits. In this respect the union alleges violations of Articles 1, 24, 25, 26, among others, of the collective agreement between The

Ontario Erectors Association and The Ironworkers District Council of Ontario.

I am instructed to advise you that the Union will refer this matter to the Ontario Labour Relations Board under Section 112a of *The Labour Relations Act*. If you wish to contact the Union with a view to settlement of these grievances, please contact Jim Harrower in Windsor (telephone 800-265-9532, toll free).

The grievance was referred to the Board in the name of The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers Local Unions 700, 721, 736, 759, 765 and 786, which is how the union party to the Ironworkers Provincial agreement is described in the agreement. However, the referral was signed as follows: "The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers Local Union 700, 721, 736, 759, 765 and 786, on behalf of Local Union 700 by their Solicitors, MacLean, Chercover".

5. Dealing firstly with the status of the other locals to continue these proceedings, it is common ground that the local of the International Association of Bridge, Structural and Ornamental Ironworkers having jurisdiction in the Sarnia area is Local 700. All of the other locals have jurisdiction in other parts of the Province. Local 721 is based in Toronto, Local 736 in Hamilton, Local 759 in Thunder Bay, Local 765 in Ottawa, and Local 786 in Sudbury. Therefore, it seems reasonable to conclude that none of the locals other than Local 700 hold the bargaining rights for employees of Ins-Co Sarnia Ltd. employed in the Sarnia area, and accordingly we are of the view that none of the other locals have standing to continue these proceedings.

6. There is nothing before us to indicate that the Ironworkers District Council of Ontario was ever certified to represent the employees of Ins-Co., and accordingly we can only assume that the representational rights for employees of the company are held by Local 700 and not directly by the Council. It is quite common for uncertified councils of trade unions to act as agents for their constituent unions. However, since in the instant case the Board has concluded that Local 700 is foreclosed from continuing the section 112a proceedings, it is clear that the Council cannot do so as the agent for the Local.

7. The remaining issue, then, is whether The Ironworkers District Council of Ontario, can on its own behalf and not as the agent of Local 700, continue the section 112a referral. On March 21, 1978, the Minister of Labour designated The District Council along with the International Association of Bridge, Structural and Ornamental Ironworkers as the employee bargaining agency to represent in bargaining all ironworkers, except rodmen, represented by a number of affiliated bargaining agents, including Local 700, in the industrial, commercial and institutional sector of the construction industry. Although the effect of this designation was to vest in the District Council and the International Local 700's rights to conclude an agreement, it did not go so far as to vest in the Council and the International Local 700's rights and obligations insofar as they concern the handling of grievances. This point is made clear by section 130 of the Act which provides as follows:

Where an employee bargaining agency has been designated under section 127 or certified under section 128 to represent a provincial unit of affiliated bargaining agents, all rights, duties, and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement.

8. The grievance before us was a grievance filed against Ins-Co Sarnia Ltd. by Local 700, not by the Ironworkers District Council of Ontario. The grievance was referred to the Board on behalf of Local 700. The rights, duties and obligations of Local 700 with respect to the grievance remain with Local 700, and have not been vested in the Council. Accordingly, we are satisfied that the Council does not have the status, on its own behalf, to continue the section 112a referral.

9. Having regard to the conclusions set out above, the Board declines to either vary or revoke its decision of January 29, 1981 or to re-list this matter for a continuation of hearing.

0234-81-R Donna Barnes, Applicant, v. International Beverage Dispensers and Bartenders Union, Local 280, Respondents.

Petition-Termination-Wife of co-owner circulating petition-Other relatives of co-owners signing petition-Whether Board inferring employer participation from family connections

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *H. M. Rossman, Q.C. and Donna Barnes for the applicant; Donald C. Mayne, Carol Street and Joe Leithwood for the respondent.*

DECISION OF D. E. FRANKS, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON; June 17, 1981

1. This is an application for termination brought by Mrs. Donna Barnes against the respondent trade union with respect to the employees of Stafford House Tavern. The Stafford House and the trade union are parties to a collective agreement by virtue of a Board decision dated December 15, 1980, in Board File 1336-80-R. That was an application under section 55 of *The Labour Relations Act*. In that decision the Board found that 452390 Ontario Limited, carrying on business as the Stafford Hotel was the successor employer and thus bound by a collective agreement. That collective agreement expired on April 30, 1981. The present application was made on April 30, 1981, and the Board therefore finds that this application is a timely application for termination.

2. The Board heard the evidence of Mrs. Donna Barnes concerning the preparation of the petition filed in this matter in her solicitors office. The Board also heard the evidence of

Mrs. Barnes concerning the circulation of the document filed in support of this application. Mrs. Barnes is a bartender at the Stafford House and is thus clearly within the bargaining unit.

3. What is unusual about the present application is that Mrs. Barnes is the wife of one of the co-owners of the Stafford House, and of the five remaining employees on the list of six employees, four of them are related to one or other of the two owners of the hotel.

4. Counsel for the respondent takes the position that circulation of the petition by Mrs. Barnes leads to the inevitable conclusion that the employer participated in the origination, preparation and circulation of the petition filed in support of the application for termination. That, however, is by no means obvious. In assessing a termination petition, the basic question before the Board is whether the statement filed in opposition to the union is voluntary. In a similar case, *Otto's Deli* [1980] OLRB Rep. Nov 1673, the Board stated at paragraph 20 the following:

“We do not think that we should readily draw inferences from the mere existence of a family relationship. In some circumstances, relatives may reasonably be perceived as having a special relationship with the employer which could influence an employee's choice with respect to trade union representation, but we do not think that this is always the case, nor are we prepared to automatically assume that the existence of a family relationship necessarily evidences a community of interest with the employer. It may be that there is a presumption tending in that direction but we are all aware that family relationships do not always exhibit the solidarity which counsel suggest. The involvement of family members is not irrelevant, but it is not the only factor to be considered especially where, as here, the inferences to be drawn from it are unclear. Of equal significance in our view is the general atmosphere prevailing at the work place, and the impact this would likely have on employee perceptions.”

That case, like the present one, involved finding of successor rights under section 55 of the Act, with respect to a business that was like the present business, essentially a family operation. Although in that case the Board for other reasons found that the petition was not voluntary, in the present application we can see no reason to conclude that the signing of the petition by the family members, was anything other than voluntary. Accordingly, we propose to give weight to the document filed in support of the application for termination, and therefore, find that not less than forty-five per cent of the employees of Stafford House Tavern in the bargaining unit, at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of May 11, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the Act.

5. The Board directs that a representation vote be taken of the employees of Stafford House Tavern. Those eligible to vote are all tapmen, bartenders, beverage waiters, (including waiters who operate automatic beer dispensers or other automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic

beverages on the date thereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

6. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Stafford House Tavern.

7. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER H. KOBRYN;

Because of Mrs. Donna Barnes unusual status of being the wife of one of the co-owners of the Stafford House, I cannot reconcile the doubt within my mind that this petition did not have employer participation in its origination, preparation and circulation. For this reason I must dissent from the majority decision for the Board.

0634-80-U Peter Walter Dow, Complainant, v. International Union of Operating Engineers, Local 793, Respondent, v. Operating Engineers Employer Bargaining Agency, Intervener.

Duty of Fair Referral-Duty of Fair Representation-Section 79-Provincial agreement making union agreement and membership pre-condition to do unit work-Owner-operator refused agreement-Whether clause in collective agreement violating Act-Whether refusal of agreement contravening section 60 or 60a

BEFORE: George W. Adams, Chairman and Board Members C. G. Bourne and C. Ballentine.

APPEARANCES: *Philip J. Wolfenden for the complainant; A. M. Minsky and E. A. Ford for the respondent; and B. W. Binning for the intervener.*

DECISION OF THE BOARD; June 5, 1981

1. This complaint alleges that the respondent has acted contrary to sections 60, 60a, 61 and 136(1) of *The Labour Relations Act*. The complaint arises out of an amendment negotiated to Article 3 of the Ontario Provincial Agreement for Operating Engineers (hereinafter referred to as "the provincial agreement") on July 19, 1979 between the respondent and the intervener. This amendment, Article 3.4(b), provides:

Owner-operators who perform work covered by this Agreement shall be signatory to an agreement with the Union and shall also be:

- (i) a member in good standing of the Union; and
- (ii) in good standing on contributions under the Health Plan, Pension Plan and for Working Dues, as required by this Agreement.

If the Union advises an employer bound by this Agreement that an owner-operator engaged by such employer is in violation of this Article, the employer shall within 24 hours replace such owner-operator.

2. The complainant has been an owner-operator of a 25 ton mobile Grove crane since April 1978. On March 1, 1980 he began work with Archer Crane Rentals Limited (hereinafter referred to as "Archer") through Dow's Crane Rental Limited (of which the complainant is the sole shareholder) supplying his own crane. At the time, the complainant was a member of the respondent but at no time did he have an agreement with the respondent union within the meaning of the above amendment. On or about March 11, 1980 Archer was performing work for Schaeffer-Townsend Limited at a Dofasco construction site. The evidence reveals that Bill Pedder, a business agent of the respondent, advised Lloyd Spalding of Schaeffer-Townsend Limited that the complainant did not have an agreement with the respondent and that Schaeffer-Townsend Limited was therefore in violation of its subcontracting obligation under the provincial agreement. In response, Schaeffer-Townsend Limited had the complainant removed from the site. The complainant's written request for an agreement with the respondent was subsequently refused by letter dated March 25, 1980 over the signature of J. F. Kennedy, Business Manager of the respondent union. Following a grievance dated April 19, 1980 filed by the respondent union against Archer under the provincial agreement, Archer terminated its relationship with the complainant. The grievance complained that Archer had subcontracted work to persons not in contractual relations with the respondent and that there had been a failure to deduct and remit various contributions. Because so much of the industrial, commercial and institutional sector (hereinafter referred to as the "ICI sector") of the construction industry in the crane rental field is organized and subject to the provincial agreement in one way or another, the respondent's continuing refusal to provide the complainant with an agreement has effectively denied him work opportunities as an owner-operator in this important sector. The evidence reveals that the complainant as a member has the same kind of access to the hiring hall as any other member seeking referral as an employee-operator. The complainant, however, has alleged that agreements have been signed with other owner-operators since March 11, 1980 and the evidence in this respect will be reviewed below. The complainant also alleges that he was "a dependent contractor of Archer Crane Rentals Limited and as such was and is in the bargaining unit represented by the respondent union." The evidence relating to this allegation must also be reviewed below. The complainant therefore submits that his services were terminated by Archer because of the unlawful actions of the respondent including:

- (a) the negotiation of Article 3.4(b) of the provincial collective agreement;
- (b) the requirement that the complainant member of the respondent union have an agreement but then refusing to sign him to an agreement;
- (c) the respondent union's position that it intends to put owner-operator members of the respondent union out of business [an allegation reviewed below];
- (d) in acting in a manner that is arbitrary, discriminatory and, in bad faith in the representation of the complainant; and

- (e) in acting in a manner that is arbitrary, discriminatory and in bad faith in the selection, referral, assignment, designation or scheduling of the complainant to employment.

3. Prior to the July 19, 1979 amendment, Article 3.4 provided:

The Employer agrees to engage only those subcontractors and equipment rentals (except equipment dealers) who are in contractual relations with the union to perform work set out in the classifications of this agreement or as otherwise agreed to by the parties.

The recognition clause of the agreement provided and continues, in the current agreement, to provide:

ARTICLE 2 - RECOGNITION

- 2.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer for whom the Union has bargaining rights engaged in work covered by the schedules and classifications set out in this agreement, and any additional classifications as may be agreed to by the parties.

Both the 1978-80 and 1980-82 agreements go on to provide for, *inter alia*, holidays, vacation pay, training fund, hours of work, overtime, meal breaks, reporting allowances, recall premium, other allowances, a health plan, a pension plan, working dues check-off, and an employer labour relations fund. Schedule "A" of the 1978-80 agreement sets out the wages for engineers on mobile Grove cranes and other types of cranes. For example, as of May 1, 1979 the schedule provided:

Wages	Vacation Pay	Benefit Plan	Pension Plan	TOTAL
13.69	1.37	.30	.40	15.76

The only explicit contractual reference to "owner-operators" in the recent history of bargaining in the crane rental field was injected by the July 19, 1979 amendment to the provincial agreement (Article 3.4(b)).

4. This complaint requires the Board to ask: "Are owner-operators covered by the provincial agreement in the sense that they are employed in the bargaining unit or referred to employment pursuant to the collective agreement and are therefore persons to whom the respondent trade union owes a duty of fair representation? And, regardless of the answer to the foregoing question: "Has the respondent's impugned conduct violated either sections 61 or 136(1)?"

5. Peter Dow has been a member of the respondent trade union for thirteen years, but mere membership does not, by itself, indicated that the respondent has acted as his bargaining agent for all of this time. He has been in possession of a hoisting engineer's certificate for ten years. From 1970 to 1975 the grievor worked as a regular employee for S. MacNally & Sons, a general contractor in the Hamilton/Toronto area. He did not own his own equipment and was an employee within a bargaining unit represented by the respondent. His hours of work,

wages, overtime, statutory holidays, vacations, etc. were determined by the applicable collective agreement. He subsequently worked as a regular employee for Cooper Construction Ltd. in the Hamilton area and was on the respondent's negotiating committee for the general contractor's agreement in 1977. He admitted that as an employee he was covered by the appropriate collective agreement from 1975 to 1978. In 1975, presumably before joining Cooper Construction Ltd., he worked as a regular employee for Bay City Crane Rentals (hereinafter referred to as "Bay City") and, after he ended his employment with Cooper Construction Ltd. in February of 1978, he bought a crane from Bay City in mid-April of 1978 which was his beginning as an owner-operator. He testified that he bought the 25 ton mobile Grove crane for \$70,000. It was financed by the Canadian Acceptance Corporation and Bay City guaranteed the note. Dow testified that he "put up" the \$5,000 sales tax and "that part of the deal [was] that [he] would work for Bay City as an owner-operator." He made \$1,800 monthly payments to the Canadian Acceptance Corporation and was not obligated to advise Bay City that such payments had been made. He gave out business cards, advertising (presumably on behalf of Bay City) and carried a Bay City rate sheet. Bay City dispatched him and paid him eighty percent of the total billing for the services rendered on its behalf. His crane had Bay City markings and was painted Bay City colours. He testified that in April of 1978 there were ten regular operators employed by Bay City and six owner-operators. By February 1980 there were fifteen regular operators and three owner-operators. Bay City decided who went out of its shop and Bay City was responsible for the accounts receivable.

6. He worked for Bay City until the end of February 1980. He refinanced the crane with United Dominions and at this time \$47,000 was outstanding. No guarantee was required by that finance company, the market value of the crane being approximately \$75,000 in February 1980. (By the time of the hearing the value had risen to \$85,000.) He testified that, having refinanced the crane, he was in a good position to change "brokers" and so went to Archer. Therefore Archer provided no guarantee to the finance company as Bay City had done and paid Dow eighty-five percent of the total billing for services rendered. The complainant passed out business cards which listed him as a "representative" of Archer and bearing Archer's and his own telephone number. He was dispatched by Archer and invoices were issued in the name of Archer. The May 1980 Archer rate sheet takes the following form:

*MAY 1980
CRANE RENTAL RATE SCHEDULE*

	<i>RATE PER HOUR</i>
30 Ton Grove Rough Terrain (92' Boom 26' Jib)	\$53.00
(2) 25 Ton Grove Truck Mount (92' Boom 24' Jib) (106' Boom 20' Jib)	\$50.00
20 Ton Rough Terrain (80' Boom 20' Jib)	\$47.00
18 Ton Rough Terrain (70' Boom 24' Jib)	\$45.00

8 Ton National hydraulic Truck Mounted Crane, 18 foot flat bed	\$36.00
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15 Ton Tagalong float (24' x 8½' platform)	\$10.00
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(NOTE: There is a 3 (three) hour minimum on above except for float.)

Any of above may include: ½, ¾ or 1 yd. concrete bucket,
Single man-basket, double man-
basket,
Lifting beams, nylon belts, at no
extra charge.

NOTE: Weekly and monthly rates are available upon request.

Discounts: 5% Discount on Weekly rental
10% Discount on Monthly rental

All rates on operated equipment include insurance, fuel and
maintainence.

Premium Time is charged before 8:00 a.m. and after 4:30 p.m.
at \$20.00 per hour.

On Saturdays. Sundays and Statutory Holidays a 4 (four)
hour minimum rental period plus operator's premium will be
charged.

Travel and/or board allowance as per Union Agreement.

The complainant made out the invoice; made a note of it for his personal records; and then received a monthly statement from Archer. The complainant has his own workmen's compensation number but only makes payments when he employs someone. Neither Bay City nor Archer made workmen's compensation payments on his behalf and no one else operated his crane during the relevant period of time. The complainant took out his own disability insurance; made his own RRSP contributions; and paid his own OHIP. Bay City and Archer did not deduct Canada Pension Plan contributions or income tax from payments made to him.

7. The complainant testified that he became an owner-operator "to better" himself because he thought he could make more money. In 1979 he earned approximately \$6,500 a month or about \$80,000 for the year. From this amount he had to make payment on and maintain his machine and provide for cables, buckets, tires, gas, grease, oil, licence fees, insurance, etc. He estimated that he paid tax on approximately \$40,000. During 1978 Dow's Crane Service was the registered name of the sole proprietorship by which he carried on business. However, on June 4, 1979 the complainant caused the incorporation of Dow's Crane Rental Limited. He and his wife are officers and directors of the company. He is the sole

shareholder and president. He said he incorporated for tax and liability reasons. Payments received from the operation of his crane were made to Dow's Crane Rental Service Limited after June of 1979. This company paid the complainant's wages (approximately \$2,000 per month) plus expenses (i.e. motel rooms, gasoline, etc.) and made the appropriate employee deductions. During the period when he or his company was receiving \$6,500 a month, a regular employee under the crane rental provincial collective agreement received \$15.00 per hour or \$600.00 per week. When the complainant started with Archer there was only himself and Archer. He said Archer did not have any employees at the time but by April of 1980 Archer had three employees and Peter Dow. At no time when working for Bay City and Archer was he paid monies in accord with the provincial collective bargaining agreement. The wages, deductions, premium rates, vacation pay, etc. were simply not relevant to his activity except by way of comparison. As long as he was making more money than a regular employee, his commitment to being an owner-operator was worthwhile.

8. The complainant candidly admitted that he did not request the respondent to file the grievance that it did against Bay City on December 29, 1978. The complainant said it was not part of the deal that Bay City was to pay working dues or contributions to the welfare plan, pension plan, training fund and labour relations fund. Indeed, the complainant was not happy with the filing of the grievance and clearly aligned himself with Bay City who was represented by the lawyer representing the complainant in the instant case. The grievance dated December 29, 1978 was sent to Bay City with a covering letter from Jack Redshaw, a business agent of the respondent. The letter and grievance read:

REGISTERED MAIL

December 29, 1978.

Bay City Crane Rentals
369 Dewitt Road
Stoney Creek, Ontario
L8E 2T1

Dear Sir:

Enclosed please find a copy of a grievance, filed on behalf of Joseph Kiss, Ken McConnell, Larry Short, Bendon MacDonald, Bill Walton, Paul Marchildon, Peter Dow and Simchison.

Would you please meet me in my office, 110 Catherine Street, North, Hamilton, Ontario on January 8, 1979 at 11:00 a.m., in order to settle this matter.

Yours truly,

J. Redshaw,
Business Representative

JR/ja
encl.-1
c.c. E.A. Ford
E.B.A.

GRIEVANCE FORM
INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 793

.....

STYLE OF GRIEVANCE (a) EMPLOYEE GRIEVANCE (Struck out)
(b) UNION GRIEVANCE

STYLE OF GRIEVANCE: *Employer Bargaining Agency and Bay City Crane Limited*

PROJECT SITE: *Various*

TYPE OF AGREEMENT: *Employer Bargaining Agency Collective Agreement*

SECTION(S) OF AGREEMENT VIOLATED: *Articles 3 and 24 and Schedule "A" Article 5*

TIME PERIOD CONCERNED: *June 19, 1978 and outstanding*

.....

THIS GRIEVANCE IS FILED ON BEHALF OF:

Joseph Kiss, Ken McConnell, Larry Short,
Bendon MacDonald, Bill Walton,
Paul Marchildon
Peter Dow
Lloyd Simchison

The nature of the grievance is as follows:-

That the Employer has failed to remit regular monthly dues, working dues, Welfare and Pension and Employer Labour Relations Fund contributions on behalf of all employees covered under the Collective Agreement.

Remedy Requested: That the Employer immediately remit all delinquent regular monthly dues, working dues, Welfare and Pension and Employer Labour Relations Fund contributions, together with interest where applicable, in accordance with the Collective Agreement.

Action Taken - Or Company Comments:

This grievance was subsequently withdrawn.

9. Similar grievances were filed November 10, 1978 against nine companies carrying on business under the name of Empire Crane. They were all settled and the terms of this settlement are outlined in a letter dated March 23, 1979 over the signature of the lawyer representing the respondent to the lawyer representing the Empire Crane companies. It provides:

Messrs. Cassels, Mitchell, Somers,
 Dutton & Winkler,
 Barristers and Solicitors,
 390 Bay Street,
 Toronto,
 Ontario,
 M5H 2G3.

Attention: D. I. Wakely Esq.

Dear Sirs,

Re: International Union of Operating Engineers, Local 793 and T.
 Buchanan & Associates Ltd., et al
 Re: *O.L.R.B. File No. 1801-78-M*

We confirm our meeting with you and Bruce Binning at the Board's offices on March 14th, 1979 in connection with the within grievance-arbitration proceedings against the owner-operators herein.

We wish to confirm that the parties have now settled these proceedings on the basis of the following agreement, namely, that:

1. The owner-operators of each of the respondents are, and shall be treated, as employees for the purposes of the application and coverage of the provincial collective agreement between the Applicant and the Employer Bargaining Agency effective from June 19th, 1978 until April 30th, 1980 ("the Collective Agreement");
2. The respondents shall forthwith pay and remit the contributions in respect of pension benefits under the Pension Plan which are due and owing for the period June 19th, 1978 until February 28th, 1979, together with the supporting information on the requisite Reporting Form for each hour earned by each owner-operator. The parties have agreed that the amount owed for this pension benefits in respect of each of the owner-operators for this period amounts to One Hundred and Eighty (\$180.00) Dollars. The contributions for pension benefits from and after March 1st, 1979 until the termination of the Collective Agreement shall be made by the respondents on behalf of the owner-operators as and when required by the said Collective Agreement;
3. From and after April 1st, 1979 until the termination of the Collective Agreement, the Respondents agree to deduct from each of the owner-operators working dues and forward same together with the requisite supporting information on the Reporting Forms as and when required by the Collective Agreement;
4. From and after July 1st, 1979 until the termination of the Collective Agreement, the Respondents agree to pay and remit welfare contributions in respect of each of the owner-operators as and when required by the Collective Agreement and remit same together with the supporting information on the Reporting Forms;

5. Contributions are not required by any of the owner-operators to the Employer Labour Relations Fund in view of the parties' agreement that such owner-operators are employees for the purposes of the Collective Agreement;

6. In the event that the Respondents/owner-operators employ or engage any employees, then the parties agree that the Respondents/owner-operators shall apply the full terms and provisions of the said Collective Agreement to these employees, including the contributions required for the Employer Labour Relations Fund;

As you will recall, the parties have adjourned the within proceedings on a sine die basis and the Applicant has undertaken to withdraw such proceedings in the event that the terms of the parties' settlement herein are complied with by the Respondents. We are taking the liberty of forwarding a copy of our letter to Mr. Binning and request that each of you duly confirm the contents of the within agreement.

Yours very truly,

ROBINS AND PARTNERS

An apparent reference to this settlement is found in the Minutes of the respondent's general membership meeting of March 25, 1979 at page 3 which reads:

J. F. Kennedy gave a report on the owner-operators. There has been an agreement that they are employees and must pay the conditions of the agreement.

More similarly worded grievances were filed against other brokerage type arrangements in May of 1979. Filed with the Board was a grievance dated May 7, 1979 filed against Ward Crane Rentals Limited (hereinafter referred to as "Ward Crane"), *inter alia*, but these companies refused to settle matters along the Empire Crane lines and the respondent decided against pursuing the matter before the Board.

10. The complainant testified that in June 1978 he tried to pay working dues, pension and welfare payments but Jack Redshaw of the respondent told him the union was not taking contributions. He testified he asked the respondent's Bill Baird on October of 1978 whether he could pay working dues and was advised that the union had not decided "what to do yet" and so was not taking any payments at the time. He admitted that he had not tried to make payments since then. Finally, he testified that when Bill Baird refused him an agreement after the Dofasco incident he asked what he was to do. He testified that Baird said he could work non-union." He said Baird stated the union "was going to put owner-operators out of business in order to prevent this trade from going the way of the truckers." Baird agreed that he spoke to Dow in March of 1980; that he explained that the respondent "was not signing anymore owner-operators"; that he probably indicated this meant Dow could not work in the ICI sector but could work in the non-union field; and that he explained the union's position in terms of the trucking industry which he believed had been hurt by brokerage arrangements. He denied saying the respondent was going to put owner-operators out of business. Baird further testified that it is very difficult to detect violations of the collective agreement by the

improper use of owner-operators in that there is only Bill Pedder and himself monitoring the situation. Jack Redshaw also testified. He stated that he received instructions from Ernie Ford of the respondent in October 1978 not to sign anymore agreements with owner-operators. He testified that when he filed the Bay City grievance in December of 1978 he thought the arrangements there were similar to "the Arlington scam" where the Board had found so-called owner-operators to be employees. See Board File No. 1652-76-M. Helena Chippett who is a clerk in the respondent's benefits department testified. She monitors payments to the plans by checking the contribution forms sent in by companies. She said she would not know whether a company or individual had an agreement with the union and indicated that the monitoring also provided by the benefit administrator was designed to detect non-payments or inaccurate payments. If there was nothing on a form that looked unusual, she would not single it out. She testified that benefit payments made by a Ron Lewzoniuk were accepted on this basis. She said his contribution form looked like that of a owner-operator and she assumed he had an agreement.

11. Andy Hall testified on the complainant's behalf. He identified himself as a member of the respondent union and an owner-operator. He said that he made an application for membership in the union on December 11, 1979 and was accepted. He apparently was working at the time as an operator. He testified that he has continued to operate as an owner-operator; that he does not have a collective agreement with the union; and that he has made contributions to the respondent's pension and welfare plans. He testified that he had been refused a collective agreement by Mr. R. Allain, a business agent for the respondent union. Mr. Joseph McDonald was called by the complainant to give evidence in reply to the respondent's defense and his testimony is usefully reviewed at this juncture. He testified that he has been a member of the trade union since 1966 and has worked as an owner-operator for the last fourteen months. He testified that he works at Belmont Crane and that he has no agreement with the union. He was refused an agreement by Chris Dowdall, Recording Secretary for the union. However, he stated that he had made benefit contributions under the provincial agreement since becoming an owner-operator. Introduced as an exhibit was a letter to him from Mr. Allain dated December 17, 1979 acknowledging his payment of \$672.00 for the months of July to December 1979 and providing him with additional remittance forms for subsequent months. The employer's name on the forms is "Joe's Crane Service." He testified that he had no written agreement with Belmont Crane and that it paid him eighty-six percent of the invoiced price of the service to its customers. He said that he bought his crane from a Tony Formica after borrowing from a bank. Mr. Formica had been working for Belmont Crane at that time. He said he is dispatched by Belmont Crane but that Belmont Crane dispatches its regular employees first and he gets "what is left over." He testified that Belmont Crane did not make workmen's compensation payments on his behalf and that if he got hurt it was his own "tough luck". He has his own liability insurance; purchases his own oil and gas; and performs his own maintenance.

12. A major witness testifying on behalf of the complainant was John Ward. He is the president and owner of Ward Crane Rentals Limited. He has been a member of the respondent trade union for twenty-two years. He became an owner-operator in 1973 and noted that there were about twenty owner-operators in the Toronto area about that time. By 1980 there were over forty. In recent years he has acted as a broker through Ward Crane dispatching the services of other owner-operators. He has never employed regular employees to operate cranes owned by the Ward Crane company. His company competes against the large crane rental houses but he specializes in the smaller mobile cranes sometimes referred to as the "taxis" of the industry. He employs two full-time and one part-time dispatcher; one full-time

and one part-time secretary; and one office manager. His company has a collective agreement with the union and he now dispatches twelve owner-operators, all of whom have agreements with the respondent union. He agreed that owner-operators were not paid under his collective agreement with the union testifying that "his owner-operators wanted better and they were satisfied to cut separate deals." He said he controls the owner-operators "just like employees" although he does not have an agreement with them in writing. They are paid eighty percent of the invoice price submitted to the customer. He testified that at one time he was in violation of the union's policy that owner-operators must have an agreement with the union but no longer is this the case.

13. He acknowledged that a grievance had been filed against him on May 7, 1979 in relation to the use of owner-operators and that he refused to accept the Empire Crane settlement as a basis for settling this grievance. The grievance, by letter dated May 2, 1979, contended that Ward Crane had failed or refused to:

- (a) pay proper wages and overtime pay to its employees, contrary to the Collective Agreement and, in particular, Articles 15, 16 and 17 thereof and Appendix "A" and Schedule "A" thereto;
- (b) pay the requisite vacation and statutory holiday pay at the rate of ten per cent (10%) of gross wages earned on termination and/or on the first pay day of June and December of each year, contrary to the Collective Agreement and, in particular, Article 13 thereof;
- (c) make and pay the required contributions, deductions and allowances with respect to Union Dues, in the Union's Trades Training Fund, Health Plan, Pension Fund, for Working Dues Check-Off, and to the Employer Labour Relations Fund as and when required by the Collective Agreement and remit same on or before the 15th day of the month following the month in which the same were deducted or earned, contrary to the Collective Agreement and, in particular, Articles 3, 14, 21 and 24 thereof and Schedule "A" thereto.

The union decided against pursuing the matter before this Board and it was adjourned *sine die* in accord with Board policy by decision dated May 29, 1979. However, after the amendment to the provincial agreement on July 19, 1979, the union filed another grievance against Ward Crane by letter dated March 19, 1980. The wording of this grievance reflects the new contractual commitments contested in the instant case and their effectiveness is suggested by the terms of the settlement endorsed by the Board in a decision dated April 15, 1980.

14. The grievance dated March 19, 1980 alleges that Ward Crane failed or refused to:

- (a) engage only subcontractors who are in contractual relations with the Union to perform work set out in the classifications of the Collective Agreement, contrary to the Collective Agreement and, in particular, Article 3.4 thereof;
- (b) further, or in the alternative, remove owner-operators engaged by it

from its projects who are not signatories to agreements with the Union and who are not

- (i) members in good standing of the Union; and
- (ii) in good standing on contributions under the Health Plan, Pension Plan and for Working Dues as required by the Collective Agreement,

contrary to the Letter of Understanding dated July 19th, 1979 ("the Letter of Understanding"):

- (c) further, or in the alternative, pay proper wages, overtime pay, vacation and statutory holiday pay to its employees and to make and pay the required contributions, deductions and allowances with respect to Union Dues, the Union's Trades Training Fund, Health Plan, Pension Fund, for Working Dues and to the Employer Labour Relations Fund as and when required by the Collective Agreement, all of which is contrary to the Collective Agreement and, in particular, Articles 3, 13, 14, 15, 16, 17, 21 and 24 thereof and Appendix "A" and Schedule "A" thereto;

At all material times to this grievance there have been and still are:

- (i) subcontractors who are in contractual relations with the Union;
- (ii) owner-operators who are signatories to agreements with the Union; and,
- (iii) members in good standing of the Union

who are required to perform the work herein covered by the Collective Agreement and these subcontractors, owner-operators and members, as the case may be, are and have been ready, willing and able to perform this work for the Employer at its construction projects.

The minutes of settlement contained in the Board's reasons of April 15, 1980 record:

MINUTES OF SETTLEMENT AND CONSENT ORDER

The Union and Employer agree to settle the within proceedings and agree with each other to request the Board to endorse its record with the following minutes of settlement and make and issue the following orders and declarations requested by the parties:

1. The Employer acknowledges and admits that it has improperly subcontracted work covered by the Provincial Collective Agreement between the Operating Engineers Employer Bargaining Agency and the Union, in effect between June 19, 1978 and April 30, 1980 ("the Collective Agreement") to James Ingham and/or James Ingham

Enterprises Ltd.; Brian Dwight; and Harry Brown and/or H.D. Crane Rentals, contrary to the Collective Agreement and, in particular, Article 3.4 thereof.

2. That the Board order that the Employer do forthwith abide by all of the terms and conditions of the said Collective Agreement and, without limiting the generality of the foregoing, the provisions of Article 3.4 of the Collective Agreement in respect of the subcontracting of work covered by the Collective Agreement.
3. That the Board order that the Employer cease and desist from violating the Collective Agreement, and without limiting the generality of the foregoing, cease and desist from sub-contracting work to or engaging the owner-operators referred to in paragraph 1 hereof in a manner that is contrary to the said Collective Agreement.
4. That the Employer forthwith pay damages to the Union calculated as follows:
 - (a) damages equivalent to the contribution and deductions owing in respect of union dues, pension fund, health plan, working dues check-off and the Employer Labour Relations Fund pursuant to the Collective Agreement for all hours worked by James Ingham, Brian Dwight, Harry Brown and Michael Ingham for the period January 1, 1980 to the date hereof, if not already paid;
 - (b) damages equivalent to the wages and vacation and statutory holiday pay for all hours worked by Brian Dwight pursuant to the Collective Agreement for the period January 1, 1980 to the date hereof.
5. The parties agree that all damages in respect of contributions to health and pension plans paid on behalf of James Ingham, Harry Brown and Michael Ingham, will be credited to the accounts of the said persons with the pension and health plans.
6. The parties agree that the Board remain seized as to the amounts of damages payable in the event that the quantum of the said damages referred to in paragraph 4 hereof cannot be settled by the parties.
7. The parties agree that the settlement herein is without prejudice to the Union's right to take proceedings against the Employer in respect of any violations of the Collective Agreement which are not the subject of these proceedings, and without limiting the generality of the foregoing, in respect of the subcontracting of work to or engaging of owner-operators or employees other than those names in these minutes of settlement.

15. John Ward testified that he had attended many union meetings on the issue of owner-operators over the last few years and that this issue was discussed openly on numerous occasions. The many copies of minutes of union meetings filed with the Board also attest to this fact. However, he testified that owner-operators were not consulted on the July 19, 1979 amendment. He stated that in June of 1977 Ernie Ford, Labour Relations Manager of the respondent union, told him that owner-operators did not have to make benefit contributions unless they hired someone. But he also admitted that he has known since 1978 that if an owner-operator "sits in the seat" he must pay full fringes and he admitted that pension benefits, welfare benefits and working dues were first introduced into the provincial agreement in June of 1978 with the exception of a modest beginning on pensions in the 1977 so-called extension agreement. He also acknowledged that the owner-operators have formed their own association of which Ward Crane has been the president and to which the complainant's lawyer is counsel.

16. William White, Manager of the Crane Rental Association, was called on behalf of the complainant. He testified that in the early 1970's there had been a strike over the forty-hour work week. Through this strike the union was successful in imposing the requirement of forty hours of pay if an employee worked any amount of time in a particular week. It was his opinion that this provision drove a number of employers out of the industry. They sold all of their equipment and many others who stayed in the industry disposed of their smaller cranes. As a result, a large number of owner-operators were created and they in turn took full advantage of their freedom to compete outside the collective agreement causing more problems for the regular employers who could not compete. He said that prior to 1973 there had been very few owner-operators (i.e. four to five in the Toronto area). He testified that in 1978 the employers managed to move from the forty-hour work week to the eight-hour day after many discussions on the owner-operator problem. The various fringe benefits were also introduced at that time although, as noted above, the pension plan had been introduced in 1977 in the one year "extended agreement." After the 1978 negotiations the employers began to receive many complaints from the respondent union that owner-operators were not making the appropriate benefit contributions. White said that the union could not enforce the fringe benefit payments unless it had an agreement with the owner-operator and even when this was the case it proved very "difficult" to enforce. Hence, the employers finally agreed to the amendment dated July 19, 1979 which could be enforced like any other subcontracting clause. He denied that there was an understanding with the union at the time that no more owner-operators would be signed to agreements. He testified that one of the reasons regular employers could not compete against owner-operators was because owner-operators did not have to pay the wages, make the benefit contributions or honour the other provisions of the provincial agreement to which the employers were bound. The more recent and successful enforcement of benefit contributions has alleviated this problem somewhat, he said. He also testified that before 1979 collective bargaining in the crane rental field had never dealt with owner-operators in any respect. There was never any demands by the union on behalf of owner-operators. He said there had only been discussions about their "unfair competition."

17.

Ernie Ford, Labour Relations Manager of the respondent union, testified that the union had approximately seventy "independent agreements" with employers and that fifty-five of these agreements were with owner-operators. In 1977 the first fringe benefit was negotiated in the form of a pension plan. In 1978 fringe benefits were expanded to include a health and welfare plan, labour relations fund and working dues. He testified that after this

bargaining development the union encountered a delinquency problem on the part of owner-operators who were under agreement. He stated that "ninety percent" were not contributing and that the existing policy of the union as reflected in article 3.4(b) evolved to meet this problem but only over a considerable period of time and debate within the union. The matter was a particularly difficult one for the union because many of the owner-operators were members and friends. Indeed, it was the prior association with many owner-operators that prompted the union to sanction their use on "union sites" by purporting to sign them to "collective agreements" thereby permitting them to comply with the basic subcontracting clause in the collective agreement and reproduced at paragraph 3 below. He said the current policy which is under attack in this case evolved from the early decision by the union not to "sign" anymore owner-operators to agreements. He said this decision was made in the fall of 1978 although a few isolated mistakes were made by subordinate union officials until the policy became firmly understood. He said that since the conception of this policy "scores of members" have been refused agreements.

18. He testified that as the interest in buying equipment increased in 1978, the union came to see the owner-operators in the context of three very different problems. First was the issue of enforceability of the agreements to which owner-operators had been signed. It was extremely difficult to detect when an owner-operator was failing to apply the agreement to himself except for the so-called "visibles", i.e. the benefit contributions. And even in this latter regard, the owner-operator had to be detected on a union site where the provincial agreement and its subcontracting prohibition applied. There was also the problem of the legal status of the agreements with owner-operators. Could the owner-operator be an employer and an employee at the same time within the meaning of *The Labour Relations Act*? It appears to have been this latter problem that discouraged the union from actually litigating the owner-operator grievances filed before July 19, 1979. Ford testified that a second major problem was that the failure of owner-operators to comply with their agreements was eroding the effectiveness of the collective agreements under which regular employees were employed. Employers were at an unfair disadvantage because the union required them to honour their collective agreements. As the owner-operators grew in number, the job opportunities for employee members declined. Over time, the crane rental employees' opposition to any increases in contractual benefits also stiffened. Thirdly, Ford stated that the union was worried that in the long term the trend toward the owner-operator would seriously undermine the trade union's survival as a bargaining agent for employees. Mention was also made of a concern for possible lawsuits by the estates of owner-operators in the event of death should the estates view the deceased owner-operators as having claims to collective agreement benefits.

19. To deal with these concerns the union began by discussing the issues directly with the brokerage houses. Ford held several meetings with those associated with Belmont Crane, Ward Crane, Empire Crane and many others. He testified that the union's position with these people was that they had to comply with their agreements with the union to the extent that they had to honour "the visibles." By this he meant that they were to consider themselves as employees when operating the equipment and that they had to make the various benefit contributions required by their agreements. Ford testified that these discussions proved fruitless. The owner-operators did not wish to make any of the contributions because many of them had made their own pension and welfare arrangements and because of a feeling that the union was not doing anything for them. These discussions took place in late 1978 and Ford described this as the first stage of the respondent union's reaction to the owner-operator problem. The second stage was the filing of grievances against owner-operators and brokerage

houses under contract in late 1978 and 1979; the decision not to increase the number of owner-operator agreements; and a policy of "non-renewal" of agreements with owner-operators who were in conciliation at the time and who failed to bring their benefit contributions in order. It was this latter strategy that seems to have produced the Empire Crane settlement during that period of time. Ford testified that in the case of Bay City the union did not believe those persons operating cranes were truly owner-operators and that this was the principal reason for the grievance referring to them as employees. But Ford testified that aside from the Empire Crane situation, the filing of grievances proved unproductive and the benefit payment delinquencies and growth of owner-operators continued. The brokerage houses took the position that the owner-operators were not employees but self-employed owners and the union had considerable doubt about its legal position under the agreements with them. This then brought the union to the third stage in dealing with the owner-operators - the negotiation of the July 19, 1979 amendment to the provincial agreement with a unilateral continuation of the union's policy, commenced in 1978, of not signing additional owner-operators to agreements. Ford testified that since the negotiation of the July amendment "everything has fallen into place."

20. Ford told the Board that the union is no longer taking owner-operators into membership because it seemed unfair to do this and then immediately deny them an agreement. He admitted, however, that some mistakes in this respect may have been made, particularly by Ron Allain, and the Andy Hall situation was such a mistake. However, Ford held a meeting of union officials in April of 1980 to explain the union's policy and eliminate continuing errors in this area. Ford pointed out that the complainant had tried to become covered by the provincial agreement by joining the Crane Rental Association of Ontario but that White had been informed by a letter dated June 17, 1980, over the signature of Ford's assistant, that the respondent did not accept his company as being covered by the provincial agreement. He testified that Ron Lewzoniuk had attempted this approach as well and was rejected in the same manner and for the same reasons. He agreed that in March of 1979 the union was taking the position that owner-operators were employees when operating their equipment and that therefore they had to pay the visibles. On the other hand, owner-operators had been given agreements so they could comply with the subcontracting provision contained in the provincial agreement. This dual nature of the owner-operator is also revealed in the applications for conciliation pertaining to over fifty owner-operators initiated March 21, 1980. He stated that the grievances in late 1978 and early 1979 assumed that the individual owner-operator agreements could not be enforced against the owner-operators as employees. The union therefore tried to assert that they were employees under the agreements pertaining to certain brokerage houses. He testified that over six hundred grievances were filed during this period in relation to benefit contribution delinquencies. Finally, he denied knowledge that either a Warren Hackett or Joe McDonald had been making benefit contributions while working as owner-operators subsequent to the amendment. He said the union monitors delinquencies not payments. He said that neither individual had an agreement with the union. Ford insisted that in negotiating the impugned amendment the union was not trying to benefit the crane rental employers but rather was seeking to represent its member employees as best it could. He denied that the union had represented the owner-operators at any time in the crane rental industry. He said the union's policy has been based on what it perceives to be the good of the majority of its members. He further said that over the last three years he had made the union's position abundantly clear to owner-operators and at no time did he seek to mislead them.

21. The Board was advised that the respondent admitted persons to its membership when there was a shortage of qualified operators and provided the persons are properly licenced. An exception is made where specially licenced operators are required. If there is no shortage of qualified members available to work, one can only become a member by working for an unorganized employer. Ford was not aware of any instance in which Andy Hall had been found working on a job site at the request of a contractor bound to the provincial agreement. The respondent did not have a collective agreement with Empire Crane in that the name was only a "banner" or trade name under which a number of owner-operators worked. Thus a grievance could not be brought directly against Empire Crane in relation to Hall. Ford testified that he was surprised that Baird had thought Lewzoniuk was covered by the provincial agreement by virtue of his membership in the Crane Rental Association and that White had corresponded with Baird. Ford said that Lewzoniuk was not covered and White was so advised. Ford was unaware that White sent correspondence to anyone other than him. On cross-examination by Mr. Binning, Ford testified that the recognition clause of the provincial agreement was based upon the terms of the Minister of Labour's 1978 designation order although the crane rental agreement itself is multi-sector in nature. He also said that when the agreement was first negotiated the parties to it did not consider a bona fides owner-operator to be an employee. He said that Article 3.4, as originally cast, required that when a general contractor bound by the provincial agreement subcontracted work affected by the agreement, the work had to be subcontracted to an employer having a collective agreement with the respondent union. Because an owner-operator was not an employer, a general contractor could not subcontract to him without being in violation of the Article. However, as a matter of practice, the union has not enforced the provision where the general contractors have used owner-operators who have "agreements" with the union whether or not these agreements are collective agreements. Ford agreed that the employers bound by the provincial agreement complained to the union about the way in which owner-operators were engaging in unfair competition and in violation of their agreements with the union. Ford said that because of the difficulties of trying to file grievances on behalf of owner-operators against the same owner-operators, the parties designed Article 3.4(b) to deal with the problem. In order for a general contractor to properly subcontract work to an owner-operator, the owner-operator has to (a) be a member of the union; (b) have an agreement with the union; and (c) not be in arrears with respect to the "visibles". Where any of these conditions are not met, the general contractor is in violation of the provincial agreement and, on the request of the union, is contractually obligated to remove the unqualified owner-operator. In other words, testified Ford, Article 3.4(b) was designed as a subcontract clause to deal specifically with work subcontracted to owner-operators. Mr. Binning requested Ford to review the Ward Crane rate sheets and Ford agreed that the nine different rates therein, depending on the size of the crane, had nothing to do with the provincial agreement which has only one wage rate to be paid to any employee-operator regardless of crane size. Ford agreed there is nothing in the provincial agreement which remotely relates to the way in which an owner-operator would run his business. He also agreed that the welfare and pension plans were central funds or group plans for the benefit of the entire membership. The larger the contributions the larger the benefits that could be paid out. The Board was advised that over two thousand employers throughout the province in all sectors make contributions on a monthly basis.

22. On cross-examination by Mr. Wolfenden, Mr. Ford admitted that in March of 1980 an owner-operator who did not qualify under the three conditions of Article 3.4(b) was unlikely to be able to work on "union jobs" in the ICI sector. Ford explained the union's current policy of refusing to expand the number of agreements with owner-operators on the

basis that it permits more work for the union's employee-operator members. When counsel pointed out that work was expanding, Ford replied that if work is to be done the union wanted its members to perform it. Ford indicated that the union was not interested either in dispatching machines as well as operators or in negotiating the business arrangements for owner-operators. Ford said the union did not want to become a broker for owner-operators. Ford testified that he believed Andy Hall was the only owner-operator admitted into the union's membership after March 1980 and he knew of no new owner-operator being given an agreement by the union after that point in time. Ford admitted that when he spoke to the people at Ward Crane after the Empire Crane settlement he probably said that if they paid the visibles everything would be alright but that when he said this he was addressing himself to those owner-operators who had agreements with the respondent union. Ford said he knew of no instance in which the union's hiring halls had dispatched men and equipment. And, finally, he admitted that he may have explained the union's position on owner-operator contributions in 1977 in error but that this was all corrected from 1978 onward.

23. On behalf of the complainant it was submitted that the intentions of the parties, as evidenced by the union's conduct from 1977 to July 19, 1979, revealed that the owner-operators were and remained covered by the provincial collective agreement. Counsel emphasized Mr. Ford's statement to the owner-operators at Ward Crane and the evidence of Mr. Bill Baird. Mr. Wolfenden pointed out that the union had gone so far as to file grievances on behalf of the owner-operators and directed the Board's attention to the union minutes of March 25, 1979 indicating that the union considered the owner-operators to be employees. It was a further submission that the complainant was clearly a dependent contractor in relation to Archer and that, in fact, the control to which he was subject went so far as to demonstrate a conventional employment relationship. If the Board accepted the latter submission, the complainant undoubtedly fell within the relevant bargaining unit.

24. Counsel submitted that if the Board found that the complainant was owed a duty of fair representation, the respondent union should be held to the strictest of standards because of the monopoly position conferred on it by the province-wide bargaining scheme of the legislation. It was argued that the respondent had discriminated against the complainant by driving him out of work as an owner-operator while other owner-operators had been permitted to work and to make the necessary contributions under the provincial agreement. It was contended that all of the above, if accepted by the Board, would also establish a violation of sections 60a and 136(1). Finally, Mr. Wolfenden submitted the requirement in Article 3.4(b) that an owner-operator must have an agreement with the respondent was contrary to section 133(2) and that the alleged threat of Mr. Baird that the respondent union was going to put owner-operators out of business was contrary to section 61. Mr. Wolfenden asked the Board to place the complainant in the position he would have been in so far as money can do on declaring that the Act had been violated and that the Board direct the union to cease and desist from any further unlawful actions in respect of Mr. Dow.

25. Counsel for the intervener submitted that there was no such thing as a "right to work" in the construction industry. He contended that Article 3.4(b) was a subcontract clause designed to regulate the subcontracting of bargaining unit work to owner-operators and that there was no evidence, other than the Article, of an intention by the parties to apply the provincial agreement to owner-operators. He argued that Article 3.4(b) indicated an interest in the union to control the use of owner-operators and not to represent them. It was submitted that self-employment in this particular context is analogous to piece rate work which the

respondent trade union and other trade unions have been fighting for years. It was pointed out that the respondent trade union's jurisdiction is very segmented and all of the people it now represents could become "self-employed." Most other trades, counsel contended, require more than one person to perform the entire task but in this particular industry one man with a machine, is sufficient. Counsel contended that the labour relations reality in the construction industry, and in labour relations generally, is to take wages out of competition and protect the work jurisdiction (i.e. jobs) of the union and its members. Counsel submitted that the respondent union had done no more.

26. Mr. Binning also submitted that there had been no evidence that Messrs. Hall, McDonald, Lewzoniuk or Hackett were permitted to perform work within the scope of the provincial agreement. There was no evidence that they had performed work in the ICI sector. Mr. Binning submitted that the evidence was totally lacking in the complainant's effort to bring himself within the bargaining unit of the provincial agreement. The union did not want to negotiate on his behalf; the provincial agreement makes no mention of the terms and conditions of the work of owner-operators; and the owner-operators operate without regard to the requirements of that agreement. It was argued that if Dow was covered by the provincial agreement when Archer terminated his services he should have brought a complaint or grievance against Archer for unjust dismissal. Counsel submitted that the agreement required by Article 3.4(b) could not be a collective agreement within *The Labour Relations Act* when the owner-operator did not employ anyone. Mr. Binning asserted that the agreement, while contemplated by the provincial agreement and therefore not precluded by section 133(2), is a "fiction" designed to control a past practice that had permitted the growth of owner-operators. Mr. Binning submitted that all of the grievances filed by the union before July 19, 1979 would have failed had they come before the Board because the owner-operators clearly were not employees under the provincial agreement and the "agreements" with the owner-operators were not collective agreements which could be enforced. It was submitted that the article which eventually evolved is designed to permit immediate self-enforcement and is, for all practical purposes, the only kind of subcontracting clause which can effectively control work subcontracted to owner-operators without employees. The article attempts to eliminate competition over wages and ensure that working conditions are the same for contractors bidding against each other for work falling within the respondent union's jurisdiction. Finally, Mr. Binning pointed out that the requirement of union membership and the payment of certain fringe benefit contributions for owner-operators was a very natural requirement in the construction industry where trade union's are very concerned about their work jurisdiction and where even certain management people may be required to be a union member if they are to give directions to tradesmen.

27. Counsel for the respondent union reviewed in detail the evidence relating to the history of owner-operators. It was submitted that in the early stages the owner-operator was tolerated and, indeed, the union gave owner-operators agreements so they could purport to comply with the subcontracting restrictions in area and provincial agreements. As conditions of work for regular employees improved, however, the use of owner-operators became more attractive to contractors to the detriment of the union's employed membership. Owner-operators were performing work within the union's jurisdiction which its employed membership would otherwise perform. The first attempt at control was to permit the use of owner-operators but to require payment of "the visibles." This proved legally and practically feasible. In an effort to assert some control the union decided to discontinue giving agreements to owner-operators but this act alone proved insufficient. It then turned to amending the provincial agreement.

28. Mr. Minsky contended that the complainant never understood he was represented by the union or covered by the provincial agreement. He wanted to be left alone and had regard to the provincial agreement only as a measure of whether it was worthwhile to remain self-employed. Counsel argued that Mr. Dow considered himself an employer or self-employed when it was convenient as, for example, when he joined the Crane Rental Association, and when he incorporated. He also asked why this complaint was not brought in the name of his company. Mr. Minsky agreed with Mr. Binning's submission on the overall inadequacy of the evidence. He said that the union was moved to protect the interests of the majority of its membership. He submitted that mere membership in the union by the complainant was insufficient to create a duty owed to him by the union under section 136 of *The Labour Relations Act*. He had to be a member employed in a bargaining unit and he had clearly failed to show this on the facts presented. Mr. Minsky submitted that there had been no selective enforcement of Article 3.4(b) and that no ill-will had been directed at the complainant personally. He pointed out that there were thousands of employees covered by the provincial agreement and that the respondent union did not track the whereabouts of owner-operators. If it discovered a violation at a site the union would seek the removal of the owner-operators as Dow had been removed at Dofasco. Counsel also argued that only Archer had the status to contest selective enforcement of a contract to which it was bound and not the complainant who was a stranger to the contract. Counsel submitted that there was no evidence indicating the union had failed to remove others when it knew of their whereabouts. Mr. Minsky argued that there was no rule preventing an owner-operator from contributing to the benefit plans whether or not he worked under the provincial agreement and that, in any event, the union only was concerned about non-payments. It was submitted that Mr. Baird did not say the union was going to put owner-operators out of business but counsel argued that, even if he had, the statement would not violate section 61 because owner-operators have no right to work arising out of *The Labour Relations Act*.

29. Section 60 of *The Labour Relations Act* provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the union, whether or not members of the trade union or of any consistent union of the council of trade unions, as the case may be.

30. For this section to apply the complainant must establish that he is an employee in the bargaining unit. In this case the relevant unit is described in the Ontario Provincial Agreement for Operating Engineers. This unit is set out in paragraph 3 above. After a careful review of all the evidence adduced, we have come to the conclusion that the complainant owner-operator was never an employee within the meaning of that provision. Until July 19, 1979 there was no reference in the provincial agreement to owner-operators and it is abundantly clear that prior to 1977 there was not the slightest intention by the contracting parties to consider owner-operators as employees under the relevant province-wide agreement. No collective agreement preceding mandatory province-wide bargaining made mention of owner-operators. No crane rental collective agreement set out terms and conditions for their utilization. What had developed over time was a practice by the respondent union of granting "agreements" to members who became owner-operators on the understanding that such an agreement complied with the original subcontracting clause set

out above also at paragraph 3. Accordingly, an owner-operator who was a member and who had an agreement with the union was deemed by the union to comply with the subcontracting requirements of the crane and equipment rental services collective agreement. This history does not, in our view, reflect representation. It reflects control and control of the type that trade unions have historically tried to assert over the subcontracting of bargaining unit work. However, the regulation of the use of owner-operators proved difficult to effect in any legally enforceable sense.

31. An “agreement” with an owner-operator cannot be a collective agreement even if one is to assume that the contracting employer party in the complainant’s case could be his company. If that company employs only one employee (the complainant), the unit of employees would consist of only one employee contrary to section 6(1) of *The Labour Relations Act*. We are of the view that the requirement of “more than one employee” is also mandatory for a voluntary recognition agreement as evidenced by the wording of sections 15(3) and 52. Moreover, the complainant, having the dual status of manager and worker, would run afoul of section 1(3)(b). Accordingly, any agreement between the union and an owner-operator is simply a device by which the union administers its contractual rights or discretion flowing from negotiated subcontracting clauses.

32. The requirement that an owner-operator be a member of the respondent probably even pre-dates the use of the agreements but again reflects the union’s jurisdictional claim to bargaining unit work. Prior to 1975 an owner-operator could not be considered an employee under the *Act* and yet owner-operators were physically performing bargaining unit work unlike the employer who employs others and who, by the relevant subcontracting clause, has to employ union members. The only way the owner-operator could comply with the union security purpose of a subcontracting clause was for himself to become a member of the union in addition to having an agreement. This dual requirement clearly reflects the composite nature of self-employment or of “working for one’s self.” But, importantly, it arises in the context of this union trying to control the self-employed not in attempts to represent them.

33. The legal status of the self-employed for the purposes of collective bargaining was altered by the dependent contractor provisions enacted in 1975. As a result of this legal development, a dependent contractor can now be considered an employee for the purposes of *The Labour Relations Act*. Therefore, while section 6(4) adds no greater legal validity to the respondent’s agreements with owner-operators, it could sanction their coverage as employees under the provincial agreement if this is what the parties intended. See *General Concrete* (1979), 22 O.R. (2d) 65 reversing (1976), 11 L.A.C. (2d) 187 ([1975] OLRB Rep. Mar. 234). It is our opinion, however, that the evidence of such intention prior to 1977 is totally lacking. We are satisfied on the evidence before us that the complainant has been self-employed at all times; that his utilization by both Bay City and Archer could not be characterized as one of employment without having regard to the dependent contractor provisions of *The Labour Relations Act*; and that on the evidence, the complainant appears to have been a dependent contractor in relation to both Bay City and Archer. Clearly, dependent contractors were not represented by the union prior to 1977.

34. Did the intention of the parties change in 1977 or at any time after that year? We think not. In 1977 the parties introduced a fringe benefit in the form of a pension plan for the first time. In 1978 the other benefits and contributions were negotiated. Just what payments were required of the owner-operators to whom bargaining unit work was subcontracted was in

doubt from the onset because the respondent's policy in this respect was unclear. In 1977 it appears that the union first accepted that the owner-operators were unaffected by the crane rental collective agreement but as complaints by crane rental employers about unfair competition increased the union began to focus its attention on this problem. Indeed, little encouragement in this respect was needed because of the respondent's own concern for the erosion of its collective agreements through the use of owner-operators and over possible legal challenge by the estates of owner-operators in the event of death. The union's response was to discontinue signing owner-operators to agreements and to require those with agreements to make the requisite contributions. Such payments were to be made by the owner-operators directly and presumably under the agreements we have already found to be unenforceable. In our view, the required payments were simply another practical (not legal) condition that the owner-operator had to meet to get on a "union site" and perform the work subcontracted to him. It is also our view that the condition of making the appropriate contributions was not a condition of representation but rather a condition of control.

35. Difficulties, however, arose when the owner-operators failed to make the required contributions. How was the requirement to be enforced? It could not be enforced under the owner-operators agreements because they were not collective agreements. The only possibility therefore was to file grievances against the brokers utilizing their services where the brokers were subject to the provincial agreement. And for these grievances to have any chance of success, the union had to allege that the owner-operators were employed by the brokers within the meaning of that agreement and we have already decided that there was no basis in fact or law to such an allegation. This did not, of course, stop the respondent union from trying and at least one brokerage arrangement capitulated in the face of the respondent's policy of non-renewal at conciliation. But the respondent's unilateral assertion of employee status for the owner-operators in all the grievances filed prior to the July 19, 1979 amendment, could not and did not change the bilateral intention expressed in the wording of the provincial agreement and the practices of the industry up until that point in time. Nowhere in the Empire settlement is there any indication that the parties to the provincial agreement were agreeing to the terms and understandings set out in that settlement. And had that grievance or any of the other grievances been proceeded with before this Board, they would have been successful.

36. Against this background then, the July 19, 1979 amendment can be seen for what it was and still is — an effort to regulate the subcontracting of bargaining unit work to owner-operators and to provide an effective enforcement mechanism for the limitations agreed to. The amendment, therefore, does not evidence an intention to bring owner-operators within the coverage of the provincial agreement as employees. The complainant's complaint based on section 60 is therefore dismissed.

37. Section 60a of *The Labour Relations Act* provides:

Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

Prior to the enactment of this provision, the Board had held that section 60 did not apply where the complainant was an individual seeking employment in a bargaining unit through a trade union. See *Operative Plasterers' & Cement Masons' International, L. 48*, [1974] OLRB

Rep. Mar. 169. The *Report of the Royal Commission on Certain Sectors of the Building Industry 1974* pointed out the problem with this conclusion in the construction industry in 1974 in writing at Vol. 1, pp. 327-328.

“In the construction industry the employees do not enjoy the security of employment that is found in other industries. The only permanent relationship is that established with the union. It is understandable that the unions would wish to provide their members with a system of hiring that would provide maximum job security. But privileges and obligations go together. The only opportunity for a tradesman to find work might be through his respective union and hiring hall: if a work application by a qualified tradesman is not accepted, that tradesman is denied his right to work. Section 38 of *The Labour Relations Act* provides some protection for employees, and section 60 provides for fair representation of employees by the union. *But what about the person who is still seeking to become an employee?* In the case before the Ontario Labour Relations Board, *A.J. Roberts and Plasters Union Local 48* (File No: 4715-73-U, dated 20 March 1974), it was held that the scope of a trade union’s duty of fair representation was restricted to employees in a bargaining unit. Equally, the opportunity for an employer to find workmen would be through the union and hiring hall. There must be some assurance that he will be treated fairly. I do not feel that a case has been made for removing the hiring hall from union control. *But, in view of the fact that the operation of hiring halls by unions with closed shop collective agreements places them in a position of complete monopoly*, it would seem to me that some form of public inspection would be justified.”
[Emphasis added]

Similar concerns were expressed in the *Norris Report* (1963) and in *The Woods Task Force Report* (1968). These reports presumably provided the rationale for using the duty of fair representation to regulate potential hiring hall abuse. Indeed, the following quotation from a recent American article suggests that that jurisdiction is also beginning to see some merit in the section 60a type approach (Robert M. Bastress, *Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls* (1979), 82 West Virginia L. R. 31).

“Unfortunately, the referral systems are not always rational and fair. Too often, there is no “system” at all and unions typically vest undue discretion in the hiring hall officials. Even in good economic times, such men can have undue power over individuals’ opportunities to earn a living. The potential for abuse grows particularly acute, however, when jobs are scarce, as they are now in many sectors of the construction and maritime industries.”

“There are compelling reasons why the DFR should apply to hiring halls and job referral systems. Union officials conducting such operations wield enormous power over the employees and hold unduly inflated discretion. The halls provide the only source of employment for union members and, in many regions, for all workers within a given industry.

That kind of power is so subject to abuse, and the stakes are so high. The issues go to the very core of all workers' primary concern - jobs. DFR protection in the grievance and collective bargaining processes is worth precious little to workers who cannot get employment because of union hiring hall abuses."

38. However, section 60a requires that a trade union be engaged, *pursuant to a collective agreement*, in the selection, referral, assignment, designation or scheduling of *persons to employment*. We have already held that owner-operators are not employees within the meaning of the provincial agreement and, for this reason, it cannot be said that the respondent was engaged in "the selection, referral, assignment, designation or scheduling of *persons to employment*" pursuant to a collective agreement in relation to owner-operators. Indeed, there was evidence that owner-operators had never been referred through the union's hiring hall and that when the complainant sought a referral as a true employee he was referred. On this ground alone the complaint, as it is based on section 60a, must be dismissed. The respondent does not wish to represent owner-operators and thereby become a broker of equipment as well as people. There is nothing in *The Labour Relations Act* which obligates it to adopt this responsibility.

39. Before moving to the next basis of the complaint, we wish to make the following findings although, because of our earlier determinations, they are not, strictly speaking, required. The union's policy has been uniformly applied in relation to all owner-operators not having an agreement with the union and the union decision to permit the continued subcontracting of work to owner-operators with agreements appears to be based on a benevolent distinction of "grand fathering" longstanding subcontracting privileges. We also point out that the complainant did not adduce sufficient evidence to establish that the respondent knowingly permitted employers covered by the provincial agreement to subcontract bargaining unit work to owner-operators not having an agreement with the union. The mere payment of contributions by owner-operators is insufficient to establish such knowledge. The most senior union officials were unaware of these payments and, in any event, the mere fact of such payments could not, in itself, fix the respondent with the knowledge that the payees were working within the ambit of the provincial agreement. Indeed, even if the respondent suspected this, it would have to find the owner-operators at work improperly. There was no evidence that this could be easily done or that the union's failure to do so amounted to a tacit approval or acquiescence of the subcontracting of work to them.

40. Section 61 of *The Labour Relations Act* provides:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

This Board has held that the negotiation of a typical subcontracting provision restricting the assignment of work to employers having a collective agreement with the appropriate trade union does not violate any provision of *The Labour Relations Act*. See *Metropolitan Toronto Apartment Builders' Association*, [1978] OLRB Rep. Nov. 1022 (Application for judicial review dismissed: (1979), 24 O.R. (2d) 394 (Div. Ct.). In the facts at hand we have concluded

that Article 3.4(b) is such a provision although tailored to an owner-operator context. If Baird made the statement that the complainant recalls him making (i.e. that the respondent was going to put owner-operators out of business), that statement would have been a reference to the trade union's policy as reflected in Article 3.4(b). And if Article 3.4(b) is not contrary to the Act, neither is a threat to implement such a policy. We find that on the facts before us, the complainant was not threatened to become or to cease to be a member of the respondent nor was he attempting to exercise a right or perform an obligation under *The Labour Relations Act*. This aspect of the complaint is therefore dismissed.

41. Section 133(2) of *The Labour Relations Act* stipulates:

On and after the 30th day of April, 1978 and subject to sections 127 and 132, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection 1, and any collective agreement or other arrangement that does not comply with subsection 1 is null and void.

We find that the agreement with an owner-operator required by Article 3.4(b) is not an agreement in substitution of a provincial agreement prohibited by this subsection. An agreement with an owner-operator is expressly contemplated by the provincial agreement and in no way conflicts with the exclusive nature of the provincial agreement. Moreover, the impugned agreements do not affect "employees represented" by the affiliated bargaining agents as contemplated by the provision. Accordingly, section 133(2) is not relevant to this complaint.

42. Section 136(1) of *The Labour Relations Act* provides:

A designated or certified employee bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of the affiliated bargaining agents in the provincial unit of affiliated bargaining agents for which it bargains, whether members of the designated or certified employee bargaining agency or not and in the representation of employees, whether members of an affiliated bargaining agent or not.

On its face, this section has no application. We have found that the respondent trade union has never represented the complainant in his capacity as an owner-operator and owner-operators are not employees within the meaning of the provincial agreement. This aspect of the complaint is therefore dismissed.

43. At the hearing the Board expressed concern over the requirement in Article 3.4(b) of union membership and the related contributions in relation to sections 38 and 12 of *The Labour Relations Act*. It can be argued that section 38, on its face, confines union security arrangements to employees in the bargaining unit and section 12, along with other sections,

clearly forbids employer support of a trade union. Counsel for the complainant, however, candidly confessed a lack of interest in this issue because his principal objective was to achieve access to union sites by owner-operators not the striking down of union membership and payment requirements. Striking down only the membership and payment requirements of Article 3.4(b) would not obtain this end because of the additional requirement of trade union endorsement by way of an agreement. On the other hand, Messrs. Binning and Minsky each argued that section 12 was aimed at "sweetheart" arrangements and not at the type of labour relations problem giving rise to Article 3.4(b). They also argued that section 38 should not be read as exhausting union security arrangements particularly in the construction industry and in the context of the owner-operator problem. Because this issue was not considered germane to the complaint as pursued by the complainant, the Board has, on reflection, decided against passing on these matters.

44. Having regard to all of the above, the complaint is dismissed in its entirety.

DECISION OF BOARD MEMBER C. J. BOURNE;

1. While I concur with the reasoning set out in this case, and with the conclusion reached that the Act has not been breached, there are nevertheless some unsettling aspects to the decision.

2. While the award indicates no unlawful acts, the action of the Union in peremptorily refusing to give Peter Walter Dow an agreement is inconsistent with its hitherto ongoing policy of granting or renewing agreements to others. While the Union is entirely within its rights in regulating its affairs generally, it should not do so in a manner which is inconsistent or arbitrary.

3. Peter Walter Dow has been a member of the Union in good standing for 13 years. There is no doubt that, since 1978, he has pursued his trade as an owner-operator, and that the union has been deprived of certain revenues which it would have received if the work had been done by employees of a contractor. Nevertheless he believed he was entitled to work as he did and as he saw others do. The decision not to grant him an agreement was not the consequence of discussions about, or notices to him, but was suddenly conveyed to him by peremptory removal from a job site. He appears to have had no warning of this eventuality.

4. The Union's action are understandable in the light of protecting its own interests, but in this instance they have acted to deprive the grievor of his business because he is outside the scope of the provincial agreement. While, to repeat, the Union has not acted unlawfully, we are left to wonder whether the dilemma confronting those concerned has been solved in any satisfactory or conclusive fashion.

2474-80-U The International Ladies' Garment Workers' Union, Complainant, v. Josh Industries Incorporated, Respondent.

Discharge for Union Activity-Health and Safety-Section 79-Whether discharge motivated by anti-union animus-Employee protesting lack of heat in abusive and disruptive manner-Whether protected exercise of rights under *Occupational Health and Safety Act*-Whether refusal to work due to inadequate toilet facilities

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

APPEARANCES: *M. Zigler and Rona Moreau for the complainant; Donald J. McKillop, Q.C. and Michael Mandel for the respondent.*

DECISION OF THE BOARD; June 2, 1981

1. This is a complaint filed under section 79 of *The Labour Relations Act* alleging that the discharges of Ivey Green and Naomi Walters, by the respondent on January 2, 1981, were in contravention of sections 3, 56 and 58 of *The Labour Relations Act*, 1970 and, in contravention of section 23(3) and 24(1) of *The Occupational Health and Safety Act*, 1978.

2. It was the evidence of Michael Mandel, President of the respondent, that Walters was discharged for refusal to perform her duties and that Green was discharged for unsubordination, threatening himself and disrupting the plant operation.

3. The respondent is a manufacturer of male sportswear employing some 49 employees. Ivey Green is a sewing machine operator hired July 20, 1979, and was under the supervision of a Dora Koumbari from August 19, 1979, to the date of her discharge. Koumbari, on January 8, 1981, was present at the machine next to Green's and giving out work to that operator when, according to Koumbari, Green stood up and "started banging her hands on her machine, shouting and screaming." Koumbari saw Mandel in another section of the shop about fifty feet away and going towards his office. Koumbari observed Mandel stop, turn around and then come over to Green at her machine where Green was still standing and screaming. The other machine operators were all "looking at them" and Koumbari continued to "give work to some of them."

4. Mandel testified that immediately prior to this incident he had been doing some paper work at the Shipping Room Table when he was approached by another supervisor, Elizabeth Foster, who was in an upset state. Foster reported that an employee, Naomi Walters, (who was then standing right behind Foster, had been requested to mop up an overflow of water in the ladies washroom, and had refused on the grounds that "she was not a plumber." Foster reported that she had told Walters she was not asking her to fix the toilet but just to mop it up and Walters refused. According to Mandel and Foster, Walters was then "yelling and screaming" and Foster was upset. Mandel stated he then said to Walters, "please mop up the water" and Walters yelled that she was not a plumber. Mandel told her he was not asking her to fix the toilet, but was asking her to mop up the water and pointed out "you were hired as a cleaning woman, please mop up the water." At this point, according to Mandel, Walters "went into another rage, screaming that she was not a plumber." Mandel told Walters he knew she was not a plumber but was asking her to mop up the water in the bathroom.

Mandel states Walters wouldn't comply with the request and he then told her "if you are not going to do the job you were hired to do, punch your card, you're fired."

5. Elizabeth Foster, who testified, stated that she had learned of the washroom problem that day from another employee, and after inspecting the problem she went to Mandel at the shipping table and told him the washroom was overflowing and he'd better get someone to look at it. Mandel stated that he couldn't do that today but, would on Monday. Foster then went to where Walters was sweeping and asked her "if she would please wipe up the water." Foster states Walters flew into a rage and shouted that she was not a plumber. Foster replied that she wasn't asking Walters to fix the washroom, but only to wipe up the water, and this provoked more shouting and Walters was swinging her broom about. Foster then went to Mandel and reported "I've had enough. I can't take any more of her bitching about not wanting to do her job." Foster, in general, corroborates the further discussions between Mandel and Walters.

6. Walters insisted on receiving her pay cheque before leaving and Mandel went into his office to get the cheque. While Mandel was gone, Walters was shouting with her face close to Fosters and swinging her broom. Foster asked Walters to stop shouting and she says "the broom started swinging more" and one of the other employees jumped between them and told Foster to "get into the office." Foster went into the office and Mandel told her not to return to the plant. Mandel took the cheque to Walters and a further argument ensued about vacation pay, and Mandel returned to the office telling Foster "I'll have to call the police, she'll not leave on her own."

7. Walters was hired on November 5, 1980, and her job was cleaning, sweeping and "tidying" the scrap boxes. She stated "I had four or five offices to clean. I got the lunchroom extra and when toilets overflow they call me — that means I'm a plumber then." She states the toilets overflowed three or four times a week, every week, and she'd have to go and clean it up. When asked if she had ever refused to clean up the toilet her response was "No. That's my duty. Every time they called me, I go and do it." Walters denies that on January 2, 1981, Foster requested her to mop the washroom. She states she was sweeping the floor when Foster came up and told her that Mandel "needs you at the cutting table", and that she then walked down with Foster. Walters states she first learned of the overflow when she got to Mandel.

8. In direct examination Walters related the conversation with Mandel opening by him saying "bathroom overflowed. Clean it up or punch out" to which she responded "why say that." Mandel then said "Yes, either clean it or punch out" and Walters said "I'm not a plumber" and Mandel responded by saying "my father is a plumber." Walters said "Yes he is in Montreal." Mandell then said "that doesn't matter, either punch out or clean it. If you don't do it I'll call the police." Walters responded "ok call them. I'll get justice."

9. On cross examination, the testimony was that Walters response to Mandel's statement of "either clean it or punch out" was "you can't talk to me like that." She then said "Michael don't say you're going to get a plumber" to which Mandel responded "either clean it or punch out," and again, that when Mandel said "overflow", I say every day overflow, why not get a plumber" and Mandel responded "either do it or punch out." Walters states she said "I can't clean up these messes every day" and was again met with "either clean it or punch out." The question was put to her "You were tired of cleaning it up?" and she replied, "Yes, I was." He gave me no time." Walters denies any broom swinging either in front of Foster or Mandel

and states that when Mandel left to get her cheque, she sat on a chair and waited and “nobody was there to speak to.”

10. It was when Mandel was on his way to the office leaving Walters that he was attracted by Ivey Green’s shouting. Mandel was 40 to 50 feet from Green, who he states was standing at her machine, pounding it and yelling that Mandel treated people like pigs, didn’t pay enough, turned the heat off and “a variety of other things.” Mandel walked to Green and asked if she had a problem and Green recited again the treatment like pigs and turning the heat off. Mandel states he started to say “if things are so bad, then . . .” when Green interrupted with “Yes, I know if things are so bad here you can get out” and Mandel said, “Yes.”

11. According to Mandel, Green then said “you’ll get yours” and when he responded “there’s nothing you can do to harm me” she replied “it won’t be me.” Mandel then said “you’re threatening me” and Green repeated “it won’t be me.” Mandel then said “I don’t have to take any threats. You’re fired, please leave.” Green demanded her pay cheque. Mandel went to the office and came back with the cheque, gave it to Green and asked her to leave. Green replied she would leave when ready. Mandel repeated his request but Green would not leave or stop working. Mandel states he felt she could damage garments if she didn’t leave immediately, and he asked her again to leave, which she refused. Mandel left to phone the police again.

12. Mandel states that during the Green episode, other employees had their heads down as though working, but in fact were not working. On cross-examination when asked how he felt threatened by Green, he replied “I have employees and have to keep a level of productivity and discipline. If an employee could threaten me and still work it could affect other employees.” He states he didn’t feel frightened but it “was undermining management authority.” He also stated that “I lost effective control over my employees. No control to discipline employees for fear of section 79 complaints coming out of my ears.” He gave as examples, employees smoking and talking, and having told supervisors “you can’t do anything to us.”

13. Green states that when she came to work in the plant at 7:30 a.m. January 2, 1981, the temperature in the plant was 60 degrees and that she complained about the lack of heat, but could not recollect to whom the complaint was made. She states when she went to the washroom at 9:30 a.m. the toilets had overflowed and she complained to either Mandel’s partner or the cleaning lady.

14. Following her break, and around 10:15 a.m. Green asked Foster for her pay cheque and said she was going home because it was cold. Foster stated the pay cheques were not ready and Green asked permission to go and get it herself. Foster then stated “she’d go again and see” which she did and the cheque was still not available and Green said “when it’s ready, give it to me please because I’m going home.” It was two or three minutes after this that Mandel and another person came and “put the heating on.”

15. Green testified that in respect to the washroom water, Walters said “I’m not cleaning the washroom” and that Foster came up to Walters and they “had words” and Foster sent Walters to Mandel.

16. Green states that Mandel came to her to see what she was shouting about and that she was shouting she was cold. Mandel said “You think I’m turning off the heat?” and Green’s reply was “Yes I do. These people around here are scared of you but I speak English and I’m

not scared and I'll tell you what I think." She asked if he'd like his wife to work in these conditions and received no reply. Green told Mandel "he hadn't done it once, he'd done it 100 times" and that "we're not pigs, we are human beings" and that "I don't blame the woman for not cleaning the washrooms." At this point Mandel said "Get out. You're fired." Green asked the reason for being fired and received no answer and Green then said "you haven't finished with this matter." Mandel's reply was "You can't do anything with me" and Green replied "I'm not going to do anything with you." When Mandel then said "get out" Green replied "I'm going", and Mandel said "Get out now its private property" Green's retort was "why don't you maintain it." She then got her things and left. When asked what had been Mandel's tone of voice, her reply was "Very, very nice, I admit. It was temper, and I had temper too. He didn't like what I shouted out to the girls."

17. Green, who had previously been a shop steward in the garment industry in England, joined the complainant union in July 1980, and was a key link in the organizing campaign with frequent contacts with full time representatives. She states she never had any discussions with supervisors about unions but that in September 1980 she asked to see Mandel because she felt she was being pushed around to different machines. She spent about half an hour in discussions with Mandel which centred on the condition of machines, the fact she wasn't on piece work, and the need for a time study. Subsequent to this she states she "didn't seem to have got any further" except she did notice other people were assigned repair work (which was not piece work). In Green's opinion she was being followed to the washroom. She derived this opinion from the fact that another employee looked at her watch then spoke to a supervisor who later came into the washroom, and from another employee who came into the washroom while Green was present and who just sat there.

18. Chas Borden, a cutter signed a union card in July and states he "got word to Mandel that he had joined the Union" and Mandel called him into the office. Mandel asked him what the Union had wanted with him and Borden told him the Union wanted him to sign. Borden states that Mandel told him "if the union gets a majority he'd close up the place tight as a drum." Mandel then called in the other three cutters and asked them individually if the Union had been in contact with them (one employee answered affirmatively) and Mandel then repeated that if a union got into Josh he would close it up tight as a drum. This evidence was uncontradicted.

19. Mandel testified that he had received the Notice to Employees for Posting in respect to the certification application on October 30, 1980, and then contacted counsel. He states that counsel's instructions were that he should bend over backwards in his conduct and that if he considered taking any action he should first think about it overnight and then not take the action. He was instructed that conditions were frozen and business should continue as usual, and that supervisors should be instructed to continue doing as in the past, but to stay clear of anything anti-union, avoid any discussions, stay away from employees. Mandel so instructed his supervisors. He states he had been instructed to do everything to avoid a section 79 complaint and that his conduct should be impeccable.

20. Immediately following the discharge of Green and Walters on January 2, 1981, Mandel phoned his counsel and advised counsel's associate of the events. Forty-five minutes later when counsel called him, he again related the events and told counsel "whether there is a reprisal for the action I have taken or not — whether I am right or wrong — that I just couldn't allow the situation to go any further. If I didn't, what little control I had left over the plant would be wiped out."

21. Considerable evidence was received by the Board respecting unsatisfactory level of heat in the plant on frequent occasions. Supervisors corroborate Green's testimony that on January 2, 1981, at the start of work the plant was cold. The plant is heated by six ceiling heaters and, while the evidence does not support the complainant's allegation that management turned off the heat overnight and on weekends, it is clear that pilot lights in the individual heaters were, many times, out, with resulting lack of heat. Green's testimony is that, starting in November, almost every other day the plant was cold and that on one occasion in November she had gone into the office to see Mandel about it. Mandel was not in the office and an office employee told her "if you don't like it you can go home" which evoked a response "who are you to tell me to go home." Green left, after telling the office employee to advise Mandel that the girls would like to talk to him in the lunchroom. Mandel did not go to the lunchroom but after lunch the Gas Company came and lit the pilot and in about an hour it was "beautiful and warm."

22. Green testified that she had complained a dozen times to the Health Inspector about different things and in September reached the Mississauga Arena Manager and told him that the plant was not clean, garbage piled up outside the washroom for a week with flies and wasps all over. Around November 1980 she complained that it was too cold to work and as a result somebody came around two or three days later and asked people if they were warm and received affirmative replies.

23. Elizabeth Foster testified that there was a Safety Committee in the plant consisting of two elected employees and two management representatives. She states that on November 27, 1980, an OHSa inspector was in the plant in response to an anonymous call and made a plant inspection in company with Foster and an employee member of the Committee. Also present was Mr. P. Dyson, Regional Manager of the Industrial Health Branch. The report, signed by the inspector following this visit notes that "no one had a specific complaint about the temperature being too cold" and that "the temperature in the factory was measured to be 20 degrees celsius" and "there is no contravention of the *Occupational Health and Safety Act, 1978*." On January 26, 1981, there was a follow up visit by an OHSa inspector to confirm that previous recommendations had been implemented and was satisfied in this regard. From July 1980 the inspector was in the plant some five or six times.

24. Mandel testified that the pilot lights have blown out when it was extremely windy, and sometimes more than once in the same day. On one occasion in December 1979 the lights of all heaters were blown out. Following this experience Mandel consulted with Black and MacDonald, the firm which regularly services these heaters at the end of the heating season, and were advised there was no way to prevent a recurrence and Black and MacDonald's Service report dated March 24, 1980, was filed with the Board. When pilot lights go out it is necessary to use a step-ladder to re-light them. Mandel and several others are qualified to perform this service. Mandel, and other witnesses testified that the heaters have never been deliberately turned off overnight, over weekends or over holidays. The individual heaters have a control on a post which is set at 70 degrees fahrenheit and neither Mandel or supervisors have changed this setting although it has been changed on occasion by other employees.

25. Mandel testified that he was aware from supervisor's reports that toilets did overflow, perhaps two or three times a month, but not necessarily every month, and that it was caused by being plugged with sanitary napkins and toilet paper. He states the overflow would dislodge these materials. He states that in the months of November and December Walters mopped up the water and some other individual would plunge the toilet.

26. We shall deal first with the alleged contraventions of *The Labour Relations Act*. Counsel for the complainant argued that, in respect to Ivey Green, on January 2, 1981, she was engaged in lawful union activities by vocalizing objections to breaches of the Health and Safety Act; and that she had been identified as a “troublemaker” and the respondent was intent on making an example of her, or alternatively, employed discipline so far in excess of what the situation called for the Board should draw the inference that the discharge was motivated by anti-union animus. In respect to Walters, counsel argued that, she similarly was an employee with no previous disciplinary record or complaints about her work, and that her willingness to speak up about the toilets was a lawful union activity; that her refusal to work was related to her physical condition, and that the respondent’s reaction of discharge was unduly harsh. We are referred to Board decisions in *Cuddy Food Products Limited*, [1979] OLRB Rep. Jan. 24; *Wyeth Ltd.* [1979] OLRB Rep. Dec. 1311.

27. Counsel for the respondent argued that the complaints resulted because of an unwarranted attitude by the union towards the employer and refers to over-statements of allegations in the particulars of the complaint, and to certain activities of the union organizer. Counsel concedes there was a heating problem in the plant, but it was not one created by it and not susceptible to correction by it and that the respondent had made full disclosure of all available facts on the problem prior to filing of the complaint. Counsel argued that, in making its determinations, the Board must direct itself to the respondent’s motivation and in so doing must consider whether any of the respondent’s views in opposition to unions in general, was in anyway a part of its motivation.

28. It is not contradicted that Mandel did in July talk with four employees of the Cutting Dept. and tell them that he would close the plant “tight as a drum” if it were organized by the union. Walters testified that she heard Mandel make a similar comment to the cutters on the floor in November. We think it significant that Borden, a member of the cutting dept., who testified to the earlier incident, makes no reference to a November incident in which he would also have been involved. We must conclude that Walters testimony in this regard is unreliable. No other evidence was called in which Mandel expressed to employees by word or deed his opposition to the union. Ms. Rona Moreau, the organizer, testified that at the certification hearing on November 21, 1980. Ms. Discola who was representing a group of objectors did, in making representations to the Board, make reference to “all kinds of in-plant problems” following the organizing campaign and referred to three “troublemakers” who she identified by name and one of whom was Ivey Green. Aside from this statement, which is itself quite general, there was no evidence before us that anyone in management prior to January 2, 1981, had any knowledge of the active role which Green played in the organizing campaign, or that she was the initiator of complaints of alleged contraventions of the Health and Safety Act. Nor, do we agree with the complainant’s characterization of the respondent’s role in the certification hearing as one of “hotly contesting the union’s application” being supported by a reading of the Board’s decision of December 5, 1980.

29. We think the evidence is clear that over a period of some months Green did voice a number of complaints. These included her complaints about difficulty of operating individual machines, which in the supervisor’s judgement other employees had no difficulty with; complaints about not being placed in piece work, in which regard the supervisor’s opinion was that Green did not try hard enough; leaving her machine to go and talk to other women, about the heating. Koumbari states her troubles were “about work. She didn’t obey instructions.” Green, at her own request, in September spent an hour with Mandel discussing many of these things, and Mandel states that he spent a lot of time working on machine

adjustments in response to her complaints. Foster, the other supervisor, testified that she, on one occasion, told Green to "Stop talking and start working:" that she was told she spent too much time in the washroom. Foster's evaluation of Green was that she was an average employee, and Mandel's that there were no more problems with her work than with others.

30. Koumbari testified that Walters wouldn't take instructions and if asked to do something would start shouting. Foster testified that before January 2, Walters refused when asked to do her job of removing cuttings from around machines and Foster had referred to the matter a couple of times to Mandel, including taking her into Mandel's office on one occasion. She stated she had had nothing but complaints from Walters from the start. Mandel's evaluation of Walters was that she was "a little obstinate — a little hard to control. In general a good worker and did pretty well everything she was supposed to do."

31. Walter's evidence regarding the January 2, 1981, incident was obviously given in a manner intended to put the best possible case forward. Her version of her initial contact with Foster that morning was that it was limited to Foster telling her that Mandel wanted to see her. Foster, on the other hand, relates an argument over her request to Walters to attend to the washroom. Green testified that Walters had refused to clean the washroom and that Foster and Walters "had words." We prefer the evidence of Foster over that of Walters in respect to the initial contact between them, and the evidence of Foster and Mandell in respect to the ensuing discussion with Mandel. In the *Cuddy Food Products Limited* case, supra, the Board quoted with approval a statement made in *Zehr's Markets Limited*[1971] OLRB Rep. Jan. 39 as follows:

"when determining the bona fides of the reasons announced by the employer, it is helpful to assess the reasonableness of the employer's actions in light of all the circumstances. If the employer's actions are unreasonable or unduly harsh and it is established, as in this case, that the employer had knowledge of the union activity which he opposed, the fact that the employer's actions were unreasonable or unduly harsh would cast serious doubt on the validity of the reasons advanced by the employer for the discharge."

In the instant case, Walters refused to do work which was within the normal ambit of duties was, in the light of all the attendant circumstances, one which in our opinion precludes the employer's action of discharge being characterized as "unreasonable or unduly harsh." It was argued that Walters had been hospitalized in September 1980 and that the work she refused to do was too heavy and that she was apprehensive of her physical well-being. That issue was never raised by her at any time during her employment, and the specific work she refused to do was the same she had previously performed many times. The more probable conclusion is that she had become disenchanted over the frequency of cleaning up messes in the washroom. Walters was a union supporter but there was no evidence that the employer had knowledge of that fact or that Walters played any active role in the union which would have raised her visibility as a union supporter. In our view this case is clearly distinguishable from the *Cuddy Food Products Limited* case on absence of employer knowledge of union support and absence of "inexplicable harshness" of treatment. It is our conclusion that the respondent has presented a credible explanation, totally free of anti-union animus for the discharge of Walters, and that the complaint alleging a contravention of *The Labour Relations Act* must be dismissed.

32. There was some essential conflict in the evidence relating to the incident involving Green on January 2, 1981. It is clear that Green was shouting at a sufficient level as to attract Mandel's attention, some 30 to 50 feet away and that she intended to make herself audible to Mandel. As to whether she was sitting or standing we think it more plausible she was standing. As to whether she was pounding her machine, may be a matter of semantics, but in any event the total episode would inevitably result in a disruption of plant activities. It is also clear that Green used some language, either as a threat or a veiled threat, whether it was as Mandel testified "you'll get yours" or as Green testified "you haven't finished with this matter." Mandel states this took place prior to his telling Green she was fired. Green's testimony was that this phase of discussion was subsequent to her being advised she was fired. Green's testimony makes no mention of her demanding her pay cheque or of Mandel leaving, going to the office and returning with the cheque, which we are satisfied did in fact happen. Green reports the discussions as though they were continuous and culminated when Mandel said "Get out now, its private property" to which Green responded "why don't you maintain it" at which point Green states she then "got her things and left." Mandel testified that Green continued to refuse to leave or to stop work when he returned with the pay cheque and that he, therefore, went to the office and placed another call to the police. It is not contradicted that in fact there were two police responses. On balance we conclude that Mandel's account of the total incident is to be preferred.

33. It is clear that Green played a leading role in the organizing campaign and equally clear that the respondent had no knowledge of her activities other than through the representations made by Ms. Discola at the certification hearing when she identified Green, along with two others as a "troublemaker." This was on November 21st. The discharge of January 2, 1981, cannot be said to be unduly harsh or unreasonable on the part of the respondent, and in all the circumstances we find it not to have been motivated in any part by anti-union animus. The complaint alleging a contravention of *The Labour Relations Act* is dismissed.

34. It is alleged that the respondent violated section 24(1) of the *Occupational Health and Safety Act, 1978* which reads,

"24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations."

and reference is made to section 23(3) which provides a statutory right to refuse to work under certain circumstances and which reads,

“23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.”

The complainant also relies on section 133 of the Regulations made under the Act, and on section 136 of those regulations which read as follows:

“133.-(1) Subject to subsection 2, an enclosed work place shall be at a temperature,

- (a) suitable for the type of work performed; and
- (b) not less than 18° Celsius.”

...

“136.-(1) Subject to subsections 3, 4 and 5, toilets and washbasins shall be provided in accordance with the following Table in rooms which shall have,

- (a) walls, partitions, doors and approaches which afford a reasonable privacy to the person using the toilet;
- (b) hot and cold water for the washbasins;
- (c) ventilation to the outdoors capable of providing ten changes of air per hour;
- (d) reasonable personal hygiene supplies and equipment; and
- (e) where separate rooms are provided for each sex, a legible sign indicating the sex by which it is to be used.”

TABLE

Number of Workers	Number of Facilities	
	Toilets	Washbasins
1 to 9	1	1
10 to 24	2	2
25 to 49	3	3
50 to 74	4	4
75 to 100	5	5

Add one toilet and one washbasin for each additional thirty workers or fraction thereof

35. The complainant argues that the evidence established the existence of a heating problem sufficiently serious to cause some employees to leave work, and that this condition resulted from the respondent's failure to re-light pilot lights which had gone out overnight. It is argued that Green was disciplined for exercising her right to express concern about the condition. In respect to Walters, the complainant argues that the work was beyond the employees physical capacity, and which she perceived to be a danger to her health, and that this resulted, in part, from the respondent's contravention of section 136(1) of the Regulations in failing to provide the required number of toilets.

36. We shall first deal with the heating problem which was one of the major expressions of concern by Green on January 2, 1981.

37. We are of the opinion that section 133(1) of the Regulations places a positive duty on the employer to maintain his work place at a suitable temperature for the work to be done. There is ample evidence that, on a continuing basis, this requirement was contravened spasmodically but reasonably frequently and, that it was contravened at the commencement of work, at 7:30 a.m. on January 8, 1981, and continued to be contravened until some time after 10:00 a.m. on that day. Section 23(3) of the *Occupational Health and Safety Act, 1978* provides the worker with a right to refuse to work under such circumstances where he has reason to believe that "such contravention is likely to endanger himself or another worker." We accept the respondent's evidence as establishing that the lack of heat condition came into being as a result of circumstances which the respondent could not guard against, and not as a result of any positive action by the respondent. Having regard to the general purpose of the Act to preclude employees from being required to work in unsafe conditions, we conclude that it is not necessary that there be any degree of employer culpability in bringing such unsafe conditions about. We also conclude that a contravention of section 133(1) of the Regulations is, on it's face, sufficient to provide an employee with reason to believe that his physical health and well-being were endangered.

38. At the time of the Green incident on January 2nd there was not then an existing contravention of Regulation 133(1), as there had been at times when an OHSA inspector inspected the premises in response to complaints. It is understandable in the face of the recurring history of this type of contravention that employees would become frustrated over their inability to have the condition eradicated. Even accepting the respondent's evidence that there were no mechanical or technical adjustments which could be made to preclude a recurrence of the condition, it is obvious that steps could have been taken, such as a pre-starting time inspection of heaters to ensure their functioning which would have eliminated the adverse impact on employees.

39. The question before us is whether Green in voicing her concerns was exercising a protected right under the Act. The statute (and its predecessor statute) establishes for the first time the right of an employee to refuse to perform work which he has reason to believe is likely to endanger himself or a fellow worker. Section 23 of the Act further sets forth positive obligations on both the employer and the employee following upon such a refusal. The whole thrust of this section is to relieve the employee of an obligation to perform work under conditions seen to be unsafe, and to require quick correction by the employer of such conditions. In the instant case, there had existed a condition of temperature in the work place which was in contravention of section 133(1) of the Regulations, and which, at the time of the Green incident had been corrected. Additionally, Green never refused to perform her work but chose to voice her complaint to management about the recurring nature of prior contraventions of section 133(1) of the Regulations. Clearly it was her right to raise such a complaint. In our view, she was not discharged for the raising of such complaint, but rather for engaging in conduct which inevitably resulted in the disruption of production and which conduct can be seen to be unreasonably abusive of management. Section 24(1) of the Act prohibits specific employer reprisals "because the worker has acted in compliance with this Act or the regulations or an order made thereunder *or has sought the enforcement of this Act or the regulations*" (emphasis added). The protection accorded to an employee by this section cannot be strained to encompass conduct such as was engaged in by Ivey Green and, the Board therefore dismisses the complaint alleging a contravention by the respondent of the *Occupational Health and Safety Act, 1978*.

40. We now turn to the washroom problem. The complainant argues that the respondent was in contravention of section 136(1) of the Regulations prescribing the number of toilets required and that this contravention may have been a contributory cause to the overflow condition. It is also argued that Walters, because of her physical condition perceived the effort involved in mopping up the overflow water to be endangering to her health.

41. Section 136(1) prescribes that for a number of workers between 25 and 49 there shall be three toilets. The respondent argues that the requirement is based solely on total number of employees and without regard to whether they are of the male or female sex: the only requirement of the section is that "where separate rooms are provided for each sex, a legible sign indicating the sex by which it is to be used." The respondent also argues that, in any event, the evidence justifies a conclusion that toilets available to female employees were in numbers complying with the Regulations and that OHSA inspectors had found no contravention in this regard.

42. Reading section 136 as a whole and with particular reference to section 136(3) which provides:

“Urinals may be substituted for one half of the required number of toilets for males...”

to adopt the respondent's argument would render section 136(1) manifestly absurd. To follow that argument to its conclusion would mean that, for instance, the total number of toilets or washbasins could be confined to a washroom provided for members of one sex and still be in compliance with the section. Such a result could never have been contemplated by the Legislature. Section 136(3) makes clear that by speaking of “the required number of toilets for males” that the requirements of section 136(1) must be read in the context of numbers of toilets and washbasins per numbers of male employees and of female employees.

43. There were two toilets in the plant used by female employees numbering 29-30. The four male employees in the plant used a washroom in the office. There was also a washroom for female employees in the office which, according to Walters, was used by the two ladies packing garments and by “others when the water overflows.” Mandel stated the women's washroom in the office was available to other employees. It seems most likely that the women's washroom in the office was available to plant females and that its utilization was a matter of personal preference and/or convenience. We therefore, do not find any contravention of the Regulations in respect to the provision of the required number of toilets.

44. Whether Walters had reason to believe that the work was sufficiently heavy to endanger her health was supported only by evidence that she had, prior to commencing work, been hospitalized although the evidence did not disclose the reason for such. She was referred to the respondent by the Manpower Branch and concedes that she did not make mention to them of any physical limitation nor, had she at any time introduced that factor to any member of management during her employment. She did give evidence that the mop she used was “heavy.” There is nothing in the evidence in respect to the January 2, 1981, incident from which the Board can infer that, at the time of her refusal to work, she then held a belief that her health was in danger. Her refusal to work was, in our judgment, based on the fact that she was completely disenchanted with the recurring necessity of cleaning up the overflow mess, and her belief that the situation called for a plumber's services which no doubt she thought would eliminate the recurring problem. We have to conclude that the health element became injected as an *ex post facto* rationalization.

45. For these reasons we find that the respondent has not contravened the *Occupational Health and Safety Act, 1978* in the discharge of Naomi Walters and the complaint is therefore dismissed.

0479-81-R Labourers' International Union of North America, Local 183, Applicant, v. **Kaneff Properties Limited**, Respondent.

Bargaining Unit-Parties agreeing upon unit restricted to employees engaged in cleaning-Relying on past Board decisions-Evidence of successful collective bargaining where such units allowed in past-Whether Board accepting agreed upon unit in circumstances

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *L. Richmond, T. Spada and J. Phillips for the applicant; D. Jane Forbes-Roberts and Gabriella C. Favero for the respondent.*

DECISION OF THE BOARD; June 30, 1981

1. This is an application for certification in which the parties reached agreement with respect to all matters in dispute between them and were prepared to waive a formal hearing before the Board. However, in view of the description of the bargaining unit to which the parties have agreed, the Board held a hearing in the matter and called upon counsel to address the Board with respect to the appropriateness of the agreed upon bargaining unit.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Counsel advised the Board that the parties had agreed upon the following bargaining unit description:

"All employees of the respondent engaged in cleaning at 2211 Sherobee Road, Mississauga, Ontario, including resident superintendants, save and except resident managers, persons above the rank of resident manager, and office and clerical staff."

In the recent case of *Modern Building Cleaning a Division of Dustbane Enterprises Limited*, Board File No. 2360-80-R, dated April 14, 1981, (unreported) the Board, in accepting a somewhat similar bargaining unit description on the agreement of the parties, expressed concern over the restrictive nature of the description and expressed doubt that such fragmentation would be accepted in future cases. At paragraph 3 of that decision, the Board stated:

"Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at the Riverside Hospital in Ottawa engaged in cleaning services, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, constitutes a unit of employees of the respondent appropriate for collective bargaining. The Board hereby notes its concern, however, over the restrictive designation of employees 'engaged in cleaning services', and expresses its doubts that such fragmentation will be accepted, even on the agreement of the parties, in future cases."

4. The Board does not generally consider bargaining units consisting of particular

classifications or departments to be appropriate. The rationale for this approach is set forth as follows in *The Corporation of the City of Barrie*, [1974] OLRB Rep. Nov. 813, at paragraph 8:

“... bargaining units consisting of particular classifications or departments are not generally considered by the Board to be appropriate unless, of course, they constitute the extent of the employer’s work force and even then the description of the bargaining unit would not refer to the classification(s) of department(s) but would be in terms of ‘all employees’; (see *Board of Education for the City of Toronto* [1965] OLRB Rep. 125 (May); *International Harvester Co. of Canada Ltd.* [1962] OLRB Rep. 372 (Dec.); and *Rainee Manufacturing Products Ltd.* [1968] OLRB Rep. 259) (June). Were the Board to act otherwise, the working force of an employer might become fragmented into a number of bargaining units and this in turn could lead to jurisdictional disputes between bargaining units, more numerous negotiations and, therefore, potentially more industrial conflict. In other words, the Board believes that the undue fragmentation of bargaining units is likely to contribute to industrial [in]stability and therefore it has refused to find such isolated groups of employees as constituting units appropriate for collective bargaining; (see *Corp. of The Township of Markham* [1969] OLRB Rep. 592; and *Tamco Limited*, Board File No. 6347-74-R).”

5. In support of his contention that the Board should accept the agreement of the parties in this matter, counsel noted that there is a history of bargaining between the parties to this application. He referred the Board to *Kaneff Properties Limited*, [1978] OLRB Rep. May 431, in which the Board, in a case involving the same parties as the instant case, dealt with the issue of the appropriateness of the bargaining unit confined to cleaning staff at an apartment building located at 2170 Sherobee Road, Mississauga, “just down the street” from the building at which the employees affected by the instant application perform their cleaning duties. In discussing the issue of “whether the bargaining unit should include painters and maintenance personnel, as well as cleaning staff employed in the . . . apartment building”, the Board stated:

“6. We turn now to the issue of the scope of the bargaining unit as it relates to the maintenance and painters employed by the respondent. In this regard it must be borne in mind that the Board is called upon to determine an appropriate unit of employees for collective bargaining, and not to enunciate what might be the ideal bargaining unit in the abstract. (*The Board of Education of the City of Toronto* [1970] OLRB Rep. July 430) and that, when employees in a grouping that is suitable for collective bargaining indicate their willingness to be represented by a given bargaining agent, they should not be effectively denied access to their rights under *The Labour Relations Act* merely because alternative and more comprehensive delineations of employees are possible (*Canada Trustco Mortgage Company* [1977] OLRB Rep. June 330).

7. According to the criteria enunciated in the *Usarco case* [1967] OLRB Rep. Sept. 526, the cleaning staff are an appropriate unit for collective bargaining apart from the maintenance staff. The nature of the work performed by each group is different. Different skills are employed and

there is little functional interdependence between cleaners and maintenance staff. There is, moreover, no interchange of employees from one function to the other. A final and telling factor is the geographic separation of the two groupings. The cleaning staff spend all of their time in the building at 2170 Sherobee Road. The maintenance staff, on the other hand, divide their working time in varying degrees among a number of apartment buildings operated by the respondent. A rational collective bargaining structure might, therefore, contemplate their inclusion in either an all-employee unit that would include a municipality-wide area or an all-maintenance employee unit of the same geographic scope. It would not serve the interests of sound collective bargaining to have these full-time employees of the respondent treated as either full-time or part-time employees in the bargaining unit of cleaning staff at 2170 Sherobee Road, depending on their job assignments and physical movement, as suggested by the respondent.

8. The Board therefore finds that all employees of the respondent engaged in cleaning at 2170 Sherobee Road, Mississauga, including resident superintendents, save and except property managers, persons above the rank of property managers, office and clerical staff, constitute a unit of employees appropriate for collective bargaining.”

6. Counsel advised the Board that the certificate granted in that decision had given rise to a viable collective bargaining relationship in that the parties had entered into a collective agreement with a recognition clause which paralleled the bargaining unit description contained in the Board’s decision. Counsel also indicated that there have been seven other certificates granted to the applicant by the Board for the type of bargaining unit description to which the parties have agreed in the instant case (see, for example, *Armel Management*, Board File No. 1823-80-R, dated February 10, 1981, unreported; *Eto Gourmet Limited*, Board File No. 2158-80-R, dated February 10, 1981, unreported; *Metro International Inc.*, Board File No. 2159-80-R, dated February 10, 1981, unreported; *Allport Investments Limited*, Board File No. 0408-80-R, dated July 17, 1980, unreported; and *Atlantis-Dellpart Towers*, Board File No. 0434-77-R, dated October 17, 1977, unreported). He further advised the Board that each of those seven certificates has resulted in a viable collective bargaining relationship. (The Board has also granted to the applicant, on the agreement of the parties, a number of certificates confined to “employees engaged in cleaning and maintenance” at specified municipal addresses: see, for example, *Rank City Wall Canada Limited*, Board File No. 2736-80-R, dated April 14, 1981, unreported; *Treal Maintenance*, Board File No. 2161-80-R, dated February 9, 1981, unreported; *York Condominium Corporation #141*, Board File No. 2065-80-R, dated January 19, 1981, unreported; and *York Condominium Number 64*, Board File No. 0005-77-R, dated October, 1977, unreported.)

7. It appears from the submissions of the parties that there are approximately fifty employees involved in the industry to which this case pertains, namely, private sector property management of apartment buildings and condominiums. Many of those employers have several locations covered by collective agreements. Nearly 100 locations are covered by collective agreements in the “property management” field. Approximately one half of the employees belong to an employers’ association called The Property Management Services Organization (“P.M.S.O.”). The applicant and P.M.S.O. entered into a collective agreement

which continued in force from December 1, 1975 to November 30, 1980. Following extensive negotiations, a second collective agreement was entered into in April of 1981. Counsel advised the Board that the rates in the P.M.S.O. agreement “basically become the standard rates in the industry”. However, in addition to the P.M.S.O. collective agreement, the applicant has entered into separate collective agreements with a number of employers who do not belong to P.M.S.O. Although the P.M.S.O. collective agreement serves as a model for those other collective agreements, their provisions vary to suit the disparate work practices and organizational structures of the various employers. Of the 800 people employed in the industry who are covered by collective agreements, approximately 400 are under the P.M.S.O. collective agreement.

8. Counsel stated that the applicant is the only trade union in this particular field. He stated that the organization of this industry has been in the process of developing for six years. He argued that the viability of the bargaining units for which certificates have been granted is demonstrated by the success which the applicant has achieved in negotiating collective agreements.

9. Counsel sought to distinguish the *Modern Building Cleaning* case, *supra*, on the ground that it related to cleaning staff at a hospital. It was his contention that concerns about undue fragmentation that are quite justifiable in the context of a large public institution such as a hospital with hundreds or thousands of employees who exercise a vast array of job skills and functions, are not of similar concern in private sector property management of apartment buildings and condominiums where employers, such as the respondent in the present case, generally employ only a few persons in each separate workplace.

10. Counsel for the respondent advised the Board that the only persons employed by the respondent at the building in question in addition to the three cleaners named in the list of employees filed by the respondent, are the resident manager and a person who relieves the resident manager. As in the case of the building at 2170 Sherobee Road (for which a certificate was granted by the Board in May of 1978 in the aforementioned decision), maintenance is performed by a “roving crew” who divide their working time in varying degrees among a number of buildings managed by the respondent in accordance with the varying requirements which exist from time to time. Landscaping work is contracted out and there has never been a lifeguard employed at the premises in question.

11. Having regard to all the circumstances, the Board is of the view that it should accept the agreement of the parties with respect to the bargaining unit in the present case. The parties have placed reasonable reliance upon the Board’s previous decision (*Kanef Properties Limited, supra*) in which it found to be appropriate, for a workplace located nearby the workplace affected by this application and substantially similar to it in all material respects, a bargaining unit which is virtually identical to the bargaining unit which the parties have agreed in the instant case. Moreover, unlike the hospital industry in which potential and actual fragmentation created a distinct need for bargaining unit descriptions which would avoid a multiplicity of bargaining units (see, for example, *Stratford General Hospital*, [1976] OLRB Rep. Sept.459), there is no evidence that any such fragmentation has occurred in the “property management” industry. The information before the Board indicates that fragmentation has not occurred and that the “cleaning” and “cleaning and maintenance” certificates which the Board has granted to the applicant have resulted in viable collective bargaining relationships. Thus, the Board is of the view that it is appropriate for it to continue to accept such agreements

with respect to bargaining units in this industry. (However, in the absence of such agreement, if cleaners and maintenance employees employed by an employer divide their time among several buildings in the municipality, the Board may conclude that cleaning staff based at only one or two of those buildings do not constitute an appropriate bargaining unit; see, for example, *Zolty Holdings Limited*, Board File No. 0030-81-R, dated June 24, 1981, unreported in which the Board found that the appropriate unit should include all employees of the employer engaged in cleaning and maintenance at the employer's buildings in Metropolitan Toronto.)

12. For the foregoing reasons, the Board, having regard to the agreement of the parties, finds that all employees of the respondent engaged in cleaning at 2211 Sherobee Road, Mississauga, Ontario, including resident superintendents, save and except resident managers, persons above the rank of resident manager, and office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on June 10, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

2596-80-U Ontario Public Service Employees Union, Complainant, v. Madame Vanier Children's Services, Respondent.

Change in Working Condition-Employer refusing to hire contract employee to fill full-time vacancy-Whether change in hiring practice in breach of statutory freeze provision

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members B. Armstrong and E. C. Went.

APPEARANCES: *Raj Anand and Pauline R. Seville for the complainant; D.J. McNamara and J. R. Dubois for the respondent.*

DECISION OF THE BOARD; June 26, 1981

1. This is a complaint filed under section 79 of the Act alleging a violation of section 70 of the Act. It is alleged that the respondent employer changed its hiring procedure during the section 70 freeze thereby breaching the Act. There is no dispute that the alleged freeze period following the applicant's notice to the respondent of its desire to bargain for a first agreement.

2. Section 70(1) of the Act provides:

“Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator or,

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated.”

3. This complaint centers on the failure of the respondent to hire Marcia Robson, a Child Care Worker on contract with the respondent as a permanent Mental Health Worker in early February, 1981. Ms. Robson worked as a student with the respondent from September to December, 1976 and then, following attainment of her diploma, was employed by the respondent as a permanent Child Care Worker I in its residential program. She worked in this capacity from April, 1977 to May, 1979. Ms. Robson resigned her employment to supervise the construction of her home. She returned to work for the respondent on or about November 19, 1980 as a Residential Mental Health Worker I on a contract which was scheduled to terminate on March 31, 1981. Ms. Robson became aware of an anticipated vacancy for a permanent residential Mental Health Worker which was expected to come open in early February, 1981. She applied for the job. The decision of the respondent not to allow Ms. Robson to fill the vacancy has given rise to the instant complaint.

4. The respondent is a social agency providing treatment to troubled children. Its residential facilities are comprised of three on-premise cottages and a community home. Two of the cottages house 10 children and the third 5 children. A Residential Mental Health Worker IV, referred to as a unit head, is responsible for the administration of a cottage and the supervision of its staff on a day-to-day basis. The agency employs about 30 health care workers at all levels. The unit heads report to Mr. Ron Sawchuk, M.S.W., the Program Manager. Mr. Sawchuk reports to Ms. Janette Lewis, M.S.W. the Treatment Director. She in turn reports to Dr. J. Dubois, the Executive Director. Dr. Dubois is responsible to the agency's Board of Directors for the efficient and effective operation of the agency. Needless to

say, much of his authority is delegated to the Treatment Director, the Program Manager and down to the unit heads.

5. The hiring of mental health care workers is a case in point. The unit head of the cottage in which a vacancy exists interviews the applicants for the job. Those who satisfy the basic requirements for the job are invited to meet with the mental health care worker in the cottage and are sometimes asked to work a few shifts with them. The unit head, in consultation with the mental health care workers in the cottage then decide who, in their view, is the most suitable candidate. The unit head informs the Program Manager of the name of the candidate chosen by the cottage. Mr. Sawchuk, the Program Manager, characterized the communication from the unit head as a recommendation. The unit heads who testified maintained that the cottage makes the selection decision. The evidence establishes that a cottage selection decision has never been overturned. The starting salary and date of commencement is determined by the Program Manager in consultation with the unit head.

6. Prior to January, 1980 the letter to hire was drafted and signed by the unit head for delivery to the successful candidate. In many cases, however, the successful candidate was told by the unit head of the cottage's decision before the drafting of the letter of hire. Both Barb Whitcroft and Errol Cochrane, the two unit heads who testified, gave evidence that, in their view, hiring was effective from the time the candidate was told that he had been selected. Indeed, a number of persons have commenced work prior to having received a letter of hire.

7. A memo dated January 24, 1980 from Janette Lewis, Treatment Director, to all treatment staff sets out a number of decisions and policies made in connection with "the new administrative reorganization of Madame Vanier". Paragraph 5 of this memo stipulates that:

"All hiring, promotion, reprimand and dismissal letters for treatment staff will be co-signed by the Treatment Director to ensure that all personnel requirements within the Agency and any legal requirements are met."

The evidence establishes that since the issuance of this memo all hiring letters have been co-signed by Ms. Lewis, the Treatment Director. Ms. Lewis testified that the purpose of having her sign the hiring letter is to ensure that the Agency is not committed to arrangements contrary to its policies. It is her understanding that the agency is committed to nothing until she co-signs the letter and it is delivered to the candidate. Notwithstanding the change in the hiring procedure, effective from January 24, 1980, the Treatment Director has never overruled the decision of a cottage with respect to selection until the instant case. She maintained, however, that all cottage decisions are subject to veto. The Executive Director, Dr. Dubois, who has been the Executive Director of the Agency for 15 years, had never personally involved himself in a hiring decision until the instant case. He also maintains that the cottage selection is subject to veto.

8. Marcia Robson applied for a permanent Mental Health Care Worker vacancy in late January, 1981. As noted, she was working for the agency as a contract employee at the time. The hiring process followed the procedure described above. Ms. Robson was the unanimous choice of the cottage and Mrs. Barb Whitcroft, the unit head, communicated the choice to Mr. Sawchuk. Mr. Sawchuk testified that he told Mrs. Whitcroft at the time that he had reservations about Ms. Robson which related to other than her child care skills. He was

concerned about the fulfilment of her contract and more importantly, he was concerned about a rumour that Mrs. Robson, as an employee of the agency, had participated in a television broadcast in early 1979 in which she had been critical of the agency's treatment endeavours. The faces of the employees who participated in this broadcast were not seen and their voices disguised. Another treatment employee had lost his job over the incident. Mr. Sawchuk testified that he anticipated that a meeting would be arranged with Marcia Robson to discuss the incident and to obtain assurances that it would not happen again. Mrs. Whitcroft, who was upset with the response of Mr. Sawchuk to the cottage's choice, met with Ms. Robson alone and then informed Mr. Sawchuk that the matter had been resolved to her satisfaction. Mrs. Whitcroft testified, and Ms. Robson confirmed, that she agreed to abide by proper grievance channels if she became a permanent employee of the agency.

9. The matter did not rest with the assurances given by Mrs. Whitcroft on Ms. Robson's behalf. Mr. Sawchuk advised Mrs. Lewis of the situation. Indeed, under the hiring procedure implemented in January, 1980 she would have become aware of the name of the individual to be hired in any event. Mrs. Lewis testified that Ms. Robson could not be hired until she signed the hiring letter and that in view of the controversy surrounding Ms. Robson she decided to leave the decision to Dr. Dubois, the Executive Director. Dr. Dubois asked for a meeting with Ms. Robson. Ms. Robson attended in Dr. Dubois' office on February 2, 1981 in the company of Mrs. Whitcroft. Dr. Dubois asked her if she had been the one who publicly criticized the agency in 1979. Ms. Robson asked how her alleged involvement in a television broadcast which was aired two years before could possibly be relevant to her selection to fill a permanent vacancy in 1981. Dr. Dubois replied that if she had been involved she had engaged in a flagrant violation of personnel policy, had done more harm to the agency than anyone else in its 15 year history, and had cast doubt upon her personal integrity. Dr. Dubois testified that if she had been involved it was, in his view, a reason for not hiring her as a permanent employee. He asked her again if she had been the one. She refused to answer and in the words of Dr. Dubois he "drew conclusions from her failure to respond". He decided that she should not be given permanent employment. As we have noted this was the first time that Dr. Dubois had vetoed a selection decision made by the members of a cottage.

10. Mrs. Whitcroft asked if the decision could be appealed or grieved. Dr. Dubois replied that it was not a question of termination but of hire. Mrs. Whitcroft took the position that Ms. Robson had already been hired. She had told Ms. Robson the previous Friday that the job was hers. She produced a letter which she had signed with a space for Mr. Sawchuk's signature confirming the employment of Ms. Robson. The letter was not signed by Mr. Sawchuk and neither was it signed, nor did it have a space for the signature of Ms. Lewis. Dr. Dubois replied that Ms. Robson had not been hired as the letter of hire had not been signed by Ms. Lewis, the Treatment Director, in accord with the procedure adopted in January, 1980. The evidence establishes that the letter drafted by Mrs. Whitcroft in respect of the hiring of Ms. Robson was the first such letter she had drafted since January, 1980 which did not provide a space for the signature of the Treatment Director.

11. The respondent employer, citing *Spar Aerospace* [1978] OLRB Rep. Sept. 859, *Windsor Airlines*, [1980] OLRB Rep. July 1147, *Hotel Canadiana*, [1980] OLRB Rep. Aug. 1210 and *Burlington Carpet*, [1980] OLRB Rep. Oct. 1361, argues that section 70 of the Act does not create new rights but simply guarantees the status quo of the employment relationship for the duration of the freeze period. The respondent maintains that Marcia Robson was never employed as a full-time permanent employee in February, 1981.

Notwithstanding the cottage's decision, it is the position of the respondent that employment is not effectuated until the hiring letter is signed by the designated authorities within the agency. In the absence of anti-union motive the respondent argues that section 70 does not create a right to be hired as no such right exists outside the freeze period. In anticipation of the union's argument, the respondent maintains that any claim that the selection of new employees by bargaining unit members (i.e. those working in a cottage) is a privilege abrogates the right of the Executive Director, Treatment Director and Program Manager, to run the organization. The respondent takes the position that these individuals have always had the right to intervene in hiring decisions and do not lose this right by virtue of the operation of section 70 of the Act.

12. The complainant trade union cites *Spar Aerospace, supra*, and *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 in support of the contention that a long-standing practice is preserved under the section 70 freeze. It is the complainant's position that collegial hiring is a long-standing practice which was in effect at the time the freeze began and was preserved by it. The complainant relied heavily on *Laurentian University*, [1979] OLRB Rep. Aug. 767 in support of its position. In that case the Board found that the University had breached section 70 of the Act when it deviated from its established practice with respect to tenured professors and attempted to revoke the tenure of a professor. The union likens the attempt by the agency in this case to revoke the hiring of Ms. Robson to the attempt by the University in the *Laurentian University* case, *supra*, to revoke tenure. The union also argues that in this case all members of the bargaining unit were entitled to expect that the agency's hiring procedures would not change during the freeze period. The union asks the Board to find on the evidence that a practice of allowing bargaining unit members to make hiring decisions in conjunction with the unit head exists and is preserved as a privilege by the section 70 freeze. In the face of the Executive Director never having previously intervened in the hiring process, the union asks the Board to find that he was not entitled to do so during the freeze period.

13. The purpose and extent of the section 70 freeze has been succinctly described in the *Laurentian University* case, *supra*, as follows:

Section 70, read as a whole, manifests a legislative intent to maintain the prior pattern of the employment relationship *in its entirety* while the parties are formalising their collective bargaining relationship or negotiating a collective agreement. This ensures that there will be a fixed basis from which to begin negotiations and preserves the status quo during the bargaining process. The status quo includes not only the existing terms and conditions of employment but also other established benefits which the employees are accustomed to receive and which can, therefore, be considered to be 'privileges.' It is clear that expressed promises, or a consistent pattern of employer conduct, can give rise to such privileges and they will be caught by the statutory freeze. As the Board noted in *St. Mary's Hospital*, Board File No. 1795-78-U (released March 30th, 1979, unreported):

Section 70(2) preserves not only the employees' terms and conditions of employment, but also *privileges* which, by reason of custom and practice, have become a part of the employment relationship. The term 'privilege' is extremely broad and extends to all of those benefits which an employee is accustomed to receiving

but to which he is not legally entitled, and which cannot, therefore, be considered a 'right.' In order to determine whether a particular benefit, or aspect of the employment relationship, has become a privilege, it is necessary to examine the circumstances of each particular case, since privileges can arise from established custom, practice or policy. The question is an evidentiary one for, by definition, the Board's consideration must go beyond the strictly legal incidents of the relationship ('rights') and include those aspects of the relationship which give rise to 'privileges.'

In order to demonstrate the existence of a privilege, it is not necessary to establish a contractual right, a formal written policy, or an express promise. It is sufficient if there is an established, and well entrenched, course of conduct which gives rise to the reasonable expectation that a benefit, previously given, will be continued.

Section 70 is not a straight jacket which prevents an employer from responding to changing business conditions; it merely requires *both parties* to maintain the existing pattern of their relationship; that is, to conduct their relationship 'as before.' In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, the Board discussed the effect of section 70 in the following way:

The 'business as before' approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

In *Spar* the Board decided that the practice of granting annual merit evaluation and increases was sufficiently well entrenched as to become a benefit, which the employees reasonably expected to receive and was, therefore, a 'privilege' within the meaning of section 70 of the Act. In *Scarborough Centenary Hospital Association*, [1978] OLRB Rep. July 679, the Board found that section 70 prevented an employer from revoking the privileges of free parking during the currency of the freeze. On the other hand, in *AES Data Limited*, [1979] OLRB Rep. May 368, the Board found that the employer was entitled to re-assign job functions since, in that case, the subject employees could not reasonably expect to

continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. A similar conclusion was reached in *Scarborough Centenary Hospital Association*, [1969] OLRB Rep. Jan. 1049, where the Board reaffirmed an employer's right to make ordinary business and production decisions, i.e. to conduct its business as before. Finally, in *A.N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479, the Board held that a union which had waived certain rights under its collective agreement could not adopt a different posture during a statutory freeze and insist upon compliance. Section 70 requires the Board to determine the pre-existing rights, privileges and duties of the parties, and then consider whether the conduct complained of alters those rights, privileges or obligations.

14. Accepting that a form of collegial hiring may be an element of the employment relationship preserved by the section 70 freeze in the professional work setting, the Board must ascertain what rights and privileges surrounding the respondent's hiring procedures are preserved by the freeze. It is clear on the evidence that at the very least the members of the cottage enjoy the privilege of making a recommendation as to the person they wish as colleague. If during the freeze period the senior management of the agency had disregarded this long-standing privilege and hired an individual to work in a cottage without involving the cottage members the Board would be hard pressed not to find a violation of section 70. However, the members of the cottage have been involved and have made a selection of this case. The complaint arises not because the members of the cottage have been ignored, but because their choice has been disregarded. The underlying issue, therefore, is whether the privilege enjoyed by the members of the cottage encompasses the making of the hiring decision in place of management.

15. It is argued that the Board should infer from the fact that the cottage selection has always been accepted that the members of the cottage, in conjunction with the unit head, have decision-making authority. However, the acceptance of cottage choices in the past is as consistent with a finding that the members of the cottage have the authority to make an effective recommendation (in the sense that it is usually acted upon) as it is with finding that the members of the cottage have decision-making authority. While a persistent pattern of acquiescence in the cottage choice suggests the possible existence of a decision-making privilege, in our view, clear evidence establishing that the employer has relinquished its right to have the final say in an activity as fundamental to its mandate as hiring would also be required.

16. It is not disputed that the Executive Director is charged with responsibility for the running of the agency. Given the sensitive nature of the agency's work, the competency and suitability of its professional staff is a major area of managerial responsibility. The Executive Director, the Treatment Director and the Program Manager all gave evidence that the ultimate responsibility for the hiring of professional staff rests with the Executive Director or his designate has always had the authority to overrule the cottage. In the absence of any evidence to establish a formal delegation of hiring authority to the cottage and in the face of a written policy statement dated January 24, 1980, requiring the Treatment Director to sign all letters of hire, we are satisfied that ultimate decision-making authority rested with senior management prior to the section 70 freeze. Indeed, the requirement for the signature of the Treatment Director can have no other meaning. Senior management may have consistently accepted the cottage's choices, as Ms. Lewis did every time she signed a letter of hire. However,

the fact that the right has been exercised in a certain way does not abrogate it. Without addressing the merits of Dr. Dubois' belief that Ms. Robson was not a suitable candidate for permanent employment, we find on the evidence that senior management did not relinquish its ultimate authority where, in its view, the suitability or competency of a candidate does not meet the standards of the agency.

17. In this case, senior management was faced for the first time with what it considered to be an unacceptable recommendation. Dr. Dubois responded just as he could have prior to the freeze, when appraised by the Treatment Director (who refused to sign the letter of hire) of the name of the candidate whom he considered to be unsuitable for permanent employment with the agency. He overruled the recommendation of the cottage. However, in so doing he acted within the parameters of the established hiring procedure.

18. This case is distinguishable from the *Laurentian University* case, *supra*, relied upon by the complainant. In that case both the procedure for acquiring tenure and the quasi judicial procedure for appealing discharge for cause were contained in a faculty handbook. The union claimed in that case that the University breached the freeze period when, for the first time, it attempted to revoke the tenure of a faculty member who had refused to withdraw legal proceedings which he had instituted against a number of students who had openly criticized his teaching. The Board commented that "tenure" in the University context means the right to continued employment unless there is sufficient cause for discharge — that is redundancy, incompetence, seriously unprofessional behavior, or persistent neglect of duties. In upholding the complaint, the Board found that the grievor had been accorded tenure as per the stated procedure and the attempt by the University to revoke tenure constituted a departure from both the stated tenure procedure and the discharge for cause procedure.

19. We have found on the evidence in this case that the ultimate decision-making authority with respect to the hiring of professional staff rests with senior management. Pursuant to its authority in this regard, senior management made a decision not to hire Ms. Robson. Notwithstanding the verbal offer of employment conveyed by Ms. Whitcroft, we are satisfied that Ms. Robson, unlike the grievor in the *Laurentian University* case, *supra*, was never hired as would allow the union to claim that her employment was terminated. Whatever might be said of those who had commenced work in the past prior to receiving a letter or hire from the agency, there is no doubt in our mind that under the existing arrangements Ms. Robson was never confirmed as a permanent employee. She did not have a right to permanent employment which would have been preserved by the freeze. The members of the cottage were consulted as to their choice to fill the permanent vacancy in accord with the privilege of consultation preserved by the freeze. The decision of senior management to overrule the cottage's choice was within the rights of management which are also preserved by the freeze. We are satisfied that the procedure under which Ms. Robson was denied permanent employment was in accord with the matrix of rights and privileges preserved by the statutory freeze. Accordingly, this complaint is hereby dismissed.

0136-81-U London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Complainant, v. Merrymount Children's Home, Respondent.

Change in Working Conditions – Practice and Procedure – Whether changes in shift assignments and hours of work in course of “business as usual” – Whether exercise of right to manage – Whether reverse onus in section 79(4a) applicable

BEFORE: Norris E. Davis, Vice-Chairman, and Board Members B. Armstrong and J.A. Ronson.

APPEARANCES: *Ted Wohl, Randy Levinson and Lyn Whittaker for the complainant; D. J. McNamara and J. Lubell for the respondent.*

DECISION OF VICE-CHAIRMAN E. NORRIS DAVIS, AND BOARD MEMBER B. ARMSTRONG; June 25, 1981

1. This is a complaint under section 79 of *The Labour Relations Act* alleging a contravention of section 70(1) of the Act by the respondent changing the shift assignments of the grievors and in their case of two of the grievors, additionally reducing regular weekly hours of work.
2. There is no dispute that section 70 was in effect at the time of the respondent's actions, and that the consent of the trade union to such changes was not obtained. It is the respondent's position that such changes were made for valid business reasons and in accordance with continuity to conduct “business as usual”.
3. The respondent has a very long history of providing residential care for children, not in need of Child Welfare Act protection but rather children of families who are undergoing some particular problem expected to be transitory. The children are, therefore, residents of the Home for relatively short periods. The respondent's services were exclusively for providing such residential care up to May 1979, when funding was received for establishing a non-residential program. This latter program of providing day-care services required an additional counselling program and also introduced regular parent participation in the over-all program. In November, 1979, the decision was taken to conduct an internal review of the programs. The review was conducted by the respondent's concept co-ordinator (responsible for the non-residential program), several members of the respondent's board and a representative of the Ministry of Health.
4. As a result of that review, the respondent in February, 1980 made several changes which included:
 - (a) scheduling employees on basic Monday to Friday work weeks and eliminating the previous practice of having two teams of 32 hours per week rotating every two weeks. It was explained that with a shift of emphasis of the respondent's services to day care, the major concentration of services was in the period of Monday to Friday; and that it was deemed inappropriate, in the view of the injection of the parent contacts factor, to have as many as three teams of employees

dealing with parents in a single week. As a result, the team rotation schedule was discontinued and staffing done by assigning to fixed shifts of three persons 7:00 a.m. — 3:00 p.m.; 2 persons 9:00 a.m. — 5:00 p.m.; and 2 persons 9:00 a.m. — 11:00 a.m. Thus resulted in elimination of two full-time child care positions. Night shift assignments were retained.

(b) The drop of residential care also resulted in a decreased need for meal service, laundry service, supervisory services and secretarial services. Consequently, cooking staff was reduced from 2 persons to 1, a laundry position was eliminated, 1-1/2 supervisory positions eliminated, secretarial hours reduced and a new position of pre-school director added.

5. On November 27, 1980, the complainant was certified as bargaining agent for all full-time employees, and notice to bargain was served on December 4, 1980, and negotiations between the parties are continuing.

6. In January, 1981 it was decided that there should be a further review conducted in the same format as the 1979/80 review and adding in participation of senior staff. Recommendations arising out of this review were approved by the respondent's board in February. One of the recommendations which was approved was to eliminate a van which, it was determined, was no longer necessary. This elimination would reduce staff on each of the 7:00 — 3:00 p.m., and 3:00 p.m. — 11:00 p.m. shifts from three persons to two on each shift and adding one person to cover the supper hour from 5:00 p.m. — 8:00 p.m. In addition, there had been some expressed desire by the night shift staff for a more regular schedule, and it was recommended to create two — 40 hour per week positions with regular days of work (and no rotation), and two — 16 hour per week positions for the weekend.

7. The van was sold in late February, but staff changes were planned to be made effective April 1, 1981. The respondent advised the union by phone on March 6th of impending lay-offs and a meeting was held on March 10th at which the respondent detailed the proposed changes. The union did not agree to the changes and asked that the matter be reconsidered. As a result of the respondent's reconsideration, it was decided to leave the night staff hours unchanged, and to add a further part-time employee from 9:00 a.m. — 12:00 noon.

8. The net impact of this final decision was that two full-time positions would be eliminated, and two part-time positions would be created (one to be from 9:00 a.m. — 12:00 noon, the other to be from 5:00 p.m. — 8:00 p.m.). On March 16th, Janice Graham and Laura Dibbs, who had the least seniority on the 7:00 a.m. — 3:00 p.m. shift and 3:00 p.m. — 11:00 p.m. shift, were advised they would be laid off on March 31st.

9. On March 25th, Dibbs was advised she would be scheduled for a 23 hour work week (consisting of a rotating schedule of days of 9:00 p.m. — 12:00 noon, and of 5:00 p.m. — 8:00 p.m., and one weekend night shift of 8 hours. On March 31st, Dibbs was advised that her schedule would not include the weekend night shift and starting April 1st she was therefore assigned to a 15 hour week. On April 13th, Dibbs was advised that commencing April 20 she would be scheduled for a 30 hour week consisting of 6 hours per day (9:00 a.m. — 12:00 noon and 5:00 p.m. — 8:00 p.m.). It was noted that this last scheduling followed Graham's voluntary quitting of the 15 hour shift to which she had been assigned.

10. Graham was advised on March 16th that she would be laid off as of April 1, 1981 and on March 25th was advised she would be scheduled for a 23 hour week, similar to that for Dibbs; and on March 31st was advised of, and assigned to, a 15 hour week, again similar to Dibbs. Graham secured other employment and terminated her employment with the respondent on April 10, 1981. It was a result of this that Dibbs was subsequently scheduled for a 30 hour week. Also on March 16th, Helen Hagen, who had previously driven the van on the 7:00 — 3:00 p.m. shift, was advised she would be assigned as of April 1st to a 9:00 a.m. — 5:00 p.m. shift. On the same day, Angie Glover, who had been assigned to the 3:00 p.m. — 11:00 p.m. shift, was advised that as of April 1st she would be assigned to the 7:00 a.m. — 3:00 p.m. shift. It is noted that at an earlier time Glover had worked the 9:00 a.m. — 5:00 p.m. shift and had been transferred to the 3:00 p.m. — 11:00 p.m. shift at her own request.

11. The complainant contended that the reasons motivating the lay-off in 1980, and initiated by the respondent were different reasons to those motivating the actions in 1981, and that therefore it cannot be said that in the 1981 lay-offs the respondent was “conducting business as before”. The complainant contended that even if the Board were to conclude that the lay-offs were proper under the Act, the device of reducing work weeks in order to balance staff against requirements is not one which has ever been previously utilized by the respondent and was not open to the respondent in 1981. The complainant also contended that the changes in shift times for Glover and Hagen were clearly in contravention of section 70(1) of the Act.

12. The respondent argued that the changes were effected based on business decisions made in good faith and that the quality of the business decision is of no concern to the Board. It was the respondent’s position that it is free to conduct its business as before in the best manner it see fits to accomplish the overall objective of “the best program with the best resources available”. The respondent also argued that the lay-off of 1980 was based on multi-reasons and not on a single reason, and the same reasons were at work in 1981, and that, in any event, it cannot be said that the respondent is restricted by section 70(1) to only making lay-offs of employees solely for the reason on which a previous lay-off had been based.

13. As the Board stated in *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. July 1147 at p. 1152,

“The purpose of the ‘freeze period’ established by section 70 of the Act is to facilitate the bargaining process by providing a fixed point of departure and a period of tranquility and stability in which to conduct negotiations for a collective agreement.”

and in *Burlington Carpet Mills of Canada Ltd.*, [1980] OLRB Rep. Oct. 1361, at p. 1364,

“Under section 70 of the Act notice to bargain does not extinguish an employer’s right to manage business. Section 70 stabilizes the *status quo*, part of which is the employer’s right to conduct its business as before and part of which is the set of rights and privileges which have accrued to employees by established practice. Section 70 of *The Labour Relations Act* therefore, preserves both employee benefits and entrenched employer rights. It does not grant any new rights to employees or to a union save the right to be protected from any change in the *status quo* for the duration of the freeze.”

14. In the instant case, the onset of the "freeze" commenced in November 1980 by virtue of section 70(2) and was continued without interregnum under section 70(1) by the serving of notice to bargain on December 4, 1980. At that time, the respondent operated four basic shifts involving ten full-time child care workers. There were three employees, including Helen Hagen and Janice Graham assigned to the 7:00 a.m. — 3:00 p.m. shift; there were two employees, including Laura Dibbs, assigned to the 9:00 a.m. — 5:00 p.m. shift; there were two employees including Angie Glover, assigned to the 3:00 p.m. — 11:00 p.m. shift; and three employees assigned to a shift 11:00 p.m. — 7:00 a.m. This latter night shift is not involved in our deliberations. The respondent's decision to lay off two employees resulted in the junior employees, Dibbs being removed from the 9:00 a.m. — 5:00 p.m. shift and Graham being removed from the 7:00 a.m. — 3:00 p.m. shift. The respondent viewed it necessary to replace Dibbs on the 9:00 a.m. — 5:00 p.m. shift and did so by transferring Helen Hagen from the 7:00 a.m. — 3:00 p.m. shift, and then transferred Angie Glover from the 3:00 p.m. — 11:00 p.m. shift to the 7:00 a.m. — 3:00 p.m. shift. When these moves were completed there were then two employees (compared to three previously) on the 7:00 a.m. — 3:00 p.m. shift ; two employees (as previously) on the 9:00 a.m. — 5:00 p.m. shift; and one employee (compared to two previously) on the 3:00 p.m. — 11:00 p.m. shift. At the same time, the respondent created two part-time positions, each involving 15 hours per week to which the replaced Dibbs and Graham were assigned.

15. The lay-off decision of the respondent resulting from the recommendations of the Program Review Committee in 1980 was based on a very substantial decrease on the respondent's residential program and a substantial build up of the newly inaugurated non-residential program, which understandably shifted the need for particular employee skills. The lay-off decision in 1981 was made in the face of a slight decrease in the residential program in the past twelve months and a steady increase in the non-residential program. It was the evidence of the executive director of the respondent that the recommendations of the Program Review Committee were related to somewhat lower residential occupancy rates and a close examination of the month to month fluctuations in non-residential care demand and total program needs and expected revenues as part of their annual planning. The respondent receives about sixty per cent of its funding from the Provincial Government and has been informed not to expect an increase in the forthcoming year in excess of eighty per cent. The respondent commenced work on its budget in January, 1981 and submitted it to the Provincial Government in March, and as of the date of hearing there had been no final negotiations of the budget. The expense budget submitted to the Government was based on the staffing assumptions which have now been implemented.

16. It is our conclusion that the elimination of the van by the respondent was done based on the evaluation that the respondent's operation had no need for it and undoubtedly because it represented an area of cost saving which the respondent saw necessary in the light of present and anticipated economic conditions. Inasmuch as the van elimination was a major factor contributing to a decreased need for full-time employee hours, the question with which we are faced with it whether section 70(1) precludes the respondent from making an adjustment in its labour force following the disposal of the van.

17. The evidence is that when the respondent was faced with a declining residential rate in 1976, it reduced its child care staff from nineteen to nine persons. The evidence also is that in 1980, when faced with a successful day care program and a continuing declining residential program, the respondent reduced redundant staff, including two full-time child care employees.

We must conclude that at the onset of the “freeze”, the employer had established that its past conduct in managing the operation was to lay off redundant staff. We do not accept the argument stated as broadly as it is by the respondent that once it is demonstrated that the decision was a valid business judgment it should not be interfered with by the Board. To accept that would be to totally ignore section 70. At the same time, we cannot conclude here that the exercise of this right to manage has interfered with any term or condition of employment or employee privilege existing at the time of the freeze. Despite the fact that the respondent may have only exercised its right to lay off redundant employees in the past where it has been related to a declining residential rate, it cannot be said that the right to lay off only existed to the extent that redundancy is created by this one circumstance. We, therefore, find that the lay off of employees by the respondent did not alter any term or condition of employment, or any right, privilege or duty of the employees and is therefore not in contravention of section 70(1).

18. As to the shift re-assignments of Hagen and Glover, it is our view that transfer of employees between established shifts to meet required staffing is a valid exercise of the residual right to manage the business and does not interfere with any term or condition of employment or of any right, privilege or duty of the employees and is therefore not in contravention of section 70(1).

19. The assignment of Dibbs and Graham on April 1, 1981, to 15 hour work weeks must be viewed differently. It must be noted, as subsequent events demonstrated, that no imperative business needs of the respondent were met by the respondent resorting to a sharing of available work between Dibbs and Graham rather than implementing the alternative of laying off one of those two and assigning all available work to the remaining employee. The evidence did not establish that “work sharing” has been previously implemented as a vehicle to balance work hours required against available employees, and cannot therefore be viewed as an exercise of the employer’s right to conduct its business as before. In our view, the instant case falls within the rationale in *Beaver Electronics* [1974] OLRB Rep. March 120, and in the absence of the consent of the trade union to the reduction in work weeks on April 1, 1981, of Dibbs and Graham, the respondent acted in contravention of section 70(1) of the Act.

20. The Board reserved its decision in respect to preliminary representations as to the applicability of section 79(4a) in respect to the legal onus in this case. *Fanshawe College of Applied Arts and Technology* [1980] OLRB Rep. April 433 in dealing with a matter under *The Colleges Collective Bargaining Act* determined that section 55(1) of that Act (which is similar to section 70(1) of *The Labour Relations Act*) was designed “to protect the bargaining rights of the trade union bargaining agent”, and that individual complainants in that case had no status to bring a complaint. It would therefore seem that section 79(4a) is not operative to establish the legal onus in the instant case, although in the view we take of the instant case it is not necessary for us to make that decision.

21. The Board orders:

- (i) that the respondent cease and desist from altering, except with the consent of the complainant trade union, any term or condition of employment of employees in the bargaining unit in making of work assignments and/or schedules, until the Minister has appointed a conciliation officer or a mediator under the Act and seven days have elapsed after the Minister has released to the parties the report of a

conciliation board and mediator, or fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board:

- (ii) that Laura Dibbs and Janice Graham be fully compensated by the respondent for all lost wages and benefits sustained through the respondent's violation of the Act;
- (iii) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in *Hallowell House Limited* [1980] OLRB Rep. Jan. 35; and
- (iv) that the respondent post copies of the attached notice marked "Appendix", after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notice posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

22. In the event that the parties are unable to agree on the compensation due to Laura Dibbs and Janice Graham, the Board remains seized of the matter.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I agree that the respondent employer has contravened section 70 of the Act by deciding to share work between its employees, Laura Dibbs and Janice Graham. However, I dissent from the reasoning that would result in the posting of a notice as a necessary and effective remedy in this situation.

2. On the facts placed before us there was no intent by the employer to take any action which it knew or should have known would result in a breach of the Act. As part of an established practice of reviewing its operations, with a view to reducing costs and minimizing its budget, the employer decided that it no longer needed to own a passenger van to transport children to and from school. Not suprisingly, the elimination of the van meant that the employer no longer needed a driver for it. The resultant shuffling of employee work schedules left one employee redundant and required a second employee to work a total of 30 hours per week on a split shift arrangement. Rather than lay-off the most junior employee, the employer asked the two most junior employees if they were willing to share the time and work 15 hours each per week. The employees agreed. After a short interval one of these employees secured work elsewhere and the remaining person began working the full complement of 30 hours per week. By attempting to minimize the effect of its decision on one of its employees, the employer has contravened section 70 of the Act in a most technical manner. In keeping with its past practice it should have terminated the employment of its most junior employee immediately.

3. The majority feel that a notice, signed by a representative of the employer, posted in the workplace, and admitting the contravention of section 70, is needed as a necessary remedy for the harm occasioned to the union. I am mindful of the reasoning of the Divisional Court in *Re Tandy Electronics Ltd. and United Steelworkers of America et al*, [1980] 30 O.R. 2d 29 (Radio Shack), when it considered the effect of a posting, and of the Board in its decision in *Valdi Inc.* [1980] OLRB Rep. Aug. 1254. And I certainly do not intend to re-hash my comments by way of dissent in the *Valdi* case. But the present situation is quite different from the *Radio Shack* and *Valdi* cases where the Board found anti-union animus and the intent to contravene the Act. Nor is the present case one resulting from the ignorance of the employer as to the existence of section 70. The employer took its proposed staffing changes to the union and, as a result of lengthy discussions, the employer withdrew some of its proposals. The union refused to consent to the changes (which consent was not needed), but the fact remains that the employer did not drop the bombshell by implementing the changes without first discussing them with the union.

4. We are dealing with a small group of employees. I hazard to predict that the Board's decision will be known by all of them within two days of its receipt by the parties. There remains the question of whether the employer's wrongful conduct has had a "chilling effect" on the union's ability to act as bargaining agent? To that question I respond with these: Would the effect be any different if the employer had terminated the employment of the one employee as it was entitled legally, rather than allowing her to share the work? Would not the effect of an immediate termination have been worse. There is no need for a posting in this case and there is no labour relations purpose for so ordering. Having acted with the best of intentions, the employer could reasonably feel that it is being forced to "eat crow". Such a result does not affect the intent and spirit of the Act, nor does it enhance the reputation of the Board within the employer community that it serves.

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY THE WORK SCHEDULES EFFECTIVE APRIL 1, 1981 FOR LAURA DIBBS AND JANICE GRAHAM.

THE ACT PROVIDES THAT WHERE A TRADE UNION REPRESENTS ALL THE EMPLOYEES IN A BARGAINING UNIT AND HAS GIVEN WRITTEN NOTICE OF ITS DESIRE TO BARGAIN WITH A VIEW TO MAKING A COLLECTIVE AGREEMENT AND NO COLLECTIVE AGREEMENT IS IN OPERATION, THE EMPLOYER SHALL NOT, EXCEPT WITH THE CONSENT OF THE TRADE UNION ALTER THE RATES OF WAGES OR ANY OTHER TERM OR CONDITION OF EMPLOYMENT OR ANY RIGHT, PRIVILEGE OR DUTY OF THE EMPLOYER, UNTIL THE MINISTER OF LABOUR HAS APPOINTED A CONCILIATION OFFICER OR MEDIATOR UNDER THE LABOUR RELATIONS ACT AND,

- (I) SEVEN DAYS HAVE ELAPSED AFTER THE MINISTER HAS RELEASED TO THE PARTIES THE REPORT OF A CONCILIATION BOARD OR MEDIATOR, OR
- (II) FOURTEEN DAYS HAVE ELAPSED AFTER THE MINISTER HAS RELEASED TO THE PARTIES A NOTICE THAT HE DOES NOT CONSIDER IT ADVISABLE TO APPOINT A CONCILIATION BOARD.

WE WILL NOT DO ANYTHING WHICH INTERFERES WITH THIS RIGHT OF THE TRADE UNION
WE WILL PAY LAURA DIBBS AND JANICE GRAHAM ANY EARNINGS LOST AS A RESULT OF
THE WORK SCHEDULES WE ESTABLISHED AS OF APRIL 1, 1981, PLUS INTEREST.

MERRYMOUNT CHILDREN'S HOME
PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 25TH day of JUNE, 1981.

0703-80-M International Union of Operating Engineers, Local 793,
Applicant, v. Newman Bros. Co. Limited and **Newman Bros. Limited**,
Respondents.

Construction Industry-Related Employer-Section 112a-Whether respondent bound by provincial agreement by virtue of section 125(a)-Whether applicant abandoned bargaining rights-Applicant relying on related employer provisions of Act

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

***APPEARANCES:** H. P. Rolph, J. Redshaw, W. Baird and P. Gauthier for the applicant; Gordon J. Weir, John A. Davis and Graham B. Newman for the respondents.*

DECISION OF THE BOARD; June 18, 1981

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination. The reference was initially filed with respect to Newman Bros. Co. Ltd. The reply which was filed with the Board indicated that the correct name of the respondent was Newman Bros. Limited.
2. At the initial hearing in this matter it appeared that there was an issue as to the proper identity of the corporation or corporations which were properly respondents in this proceeding. The applicant expressed surprise at the existence of more than one corporation and asked that the Board apply the provisions of section 55 and 1(4) of *The Labour Relations Act* to the circumstances of the referral and to amend its referral to apply to both respondents. Having regard to the representations before it, the Board amends the name of the respondent appearing in the style of cause as "Newman Bros. Co. Ltd." to read "Newman Bros. Co. Limited and Newman Bros. Limited".
3. The applicant has alleged that the respondents have failed or refused to engage subcontractors who are in contractual relations with the applicant from and after May 28, 1980, contrary to article 3.4 of a collective agreement which is binding on the applicant and the respondent which became operative from May 1, 1980. The applicant has requested that the respondents engage only those subcontractors who are on contractual relations with the applicant and that damages in the amount of the current hourly rate plus benefits and vacation pay times eight hours per day be paid to the applicant on behalf of its members.
4. The respondents have adopted the position that the applicant does not have the bargaining rights referred to in the preceding paragraph and that, in particular, Newman Bros. Co. Limited is not bound by the province-wide collective agreement which is binding on the applicant. It is the position of the respondents that any bargaining rights which the applicant has held with respect to their employees have been abandoned by the conduct of the applicant.
5. The parties asked that the Board determine the issues with respect to the application of sections 55 and 1(4) to the respondents and to determine whether there had been a violation of the province-wide collective agreement referred to in paragraph three and to reserve on the question of damages.

6. The origin of the Newman group of companies began on July 27, 1918, with the incorporation of Newman Bros. Limited to carry on business as general contractors and builders and to deal in contracting and building plants, equipment, materials and supplies. On December 14, 1961, George D. Newman Limited was incorporated and by supplementary letters patent dated July 12, 1964, the name of George D. Newman Limited was changed to Newman Bros. Co. Limited. By supplementary letters patent dated December 31, 1964, Newman Bros., Limited changed its name to Newman Investments (St. Catherines) Limited. During 1964 or 1965, Newman Investments (St. Catherines) Limited became inactive as a construction company, however, it still operates as an investment company. On July 8, 1964, Newman Bros., Limited resolved at a meeting of its directors to sell all trucks and equipment and all office equipment to Newman Bros. Co. Limited at book value as of June 30, 1964, in the amount of \$33,343.25 and to receive from Newman Bros. Co. Limited a demand note for this amount dated July 2, 1964, bearing interest at three percent per annum. In addition, the directors of Newman Bros., Limited also resolved at this meeting to assign as of July 1, 1964, more than twelve building contracts for completion to Newman Bros. Co. Limited with the profit or loss on each contract to be allocated *pro rata* to Newman Bros., Limited and Newman Bros. Co. Limited on the basis of costs incurred and paid by each company.

7. On April 24, 1979, Newman Bros. Ltd. was incorporated and the objects for which it was incorporated state, *inter alia*, "to carry on business as general contractors and builders, and to deal in contracting and building plants, equipment, materials and supplies . . .". By articles of amendment dated August 24, 1979, the name of Newman Bros. Ltd. was amended to Newman Bros. Limited. The shareholders of the new company Newman Bros. Limited were: J.D. Newman 20%, H.C. Newman 20%, G.B. Newman 20%, Roger W. Martens 20%, David S. Bennett 10% and John A. Davis 10%. At that time the shareholders in Newman Bros. Co. Limited were: Estate of George D. Newman 20%, W.C. Newman 20%, F. H. Newman 20%, J.H. Newman 20%, H.C. Newman 10% and J.D. Newman 10%. The original shareholders of Newman Bros., Limited as of 1964 were: G.D. Newman (now estate of) 30%, W. C. Newman 30%, J. H. Newman 25% and F. H. Newman 15%.

8. Upon the incorporation of Newman Bros. Limited in 1979 there was a sale of equipment to it from Newman Bros. Co. Limited. This equipment consisted of trucks, a tractor, miscellaneous equipment and office equipment and was sold at fair market value. In addition, Lincoln Concrete Pumping Service, which was a proprietorship of Newman Bros. Co. Limited and which had been formed to provide a service to general contractors in order to pump concrete to high elevations, was sold by Newman Bros. Co. Limited to Newman Bros. Limited. After the sale of these items, Newman Bros. Co. Limited retained its own accounts payable and accounts receivable and still exists as a corporate entity.

9. John A. Davis has been the secretary-treasurer of Newman Bros. Limited since July 1, 1979. He began his association with the Newman group of companies in June of 1958. Mr. Davis was also the manager of Newman Bros. Co. Limited from December of 1965. At the time of the hearing, Mr. Davis was performing services for Newman Bros. Co. Limited, Newman Bros. Limited and Newman Investments (St. Catherines) Limited. Prior to December of 1965 Mr. Davis was employed by Newman Bros., Limited (now known as Newman Investments (St. Catherines) Limited). He commenced his employment with Newman Bros., Limited as an accountant in June of 1958.

10. The minutes of a meeting of the directors of Newman Bros. Co. Limited dated January 7, 1965, contain a resolution which states:

That the company having acquired the contracting operating assets of Newman Brothers, Limited [sic], and hereby as Successor Company, adopts the Retirement Income Plan for the Supervisory Employees of Newman Brothers, Limited [sic], effective January 4, 1965; and that the Company enters into such supplementary trust agreements with the Canada Trust Company as may be necessary; and that the Employees of the Company be eligible to continue their participation in the said Plan subject to and with the benefit of the terms thereof.

Mr. Davis informed the Board that Newman Bros. Co. Limited assumed the work force previously employed by Newman Bros., Limited. The head office of Newman Bros., Limited and Newman Bros. Co. Limited was the same and Mr. Davis and the office staff performed the same work for both companies.

11. The minutes of a meeting of the directors of Newman Bros. Co. Limited dated July 19, 1979, in part, state:

A recommendation was made that Newman Bros. Co. Limited cease active operations as a General Contractor as of June 30, 1979 but complete all contracts on hand at that time. After considerable discussion it was agreed and unanimously carried that:

Newman Bros. Co. Limited would cease bidding effective June 30, 1979 and go out of the General Contracting Business as of this date but would complete all contracts on hand and that the General Contracting operations would be carried on by the successor company Newman Bros. Limited.

...

A discussion took place concerning the new company in respect to finding and bonding, it was agreed and unanimously carried that Newman Bros. Co. Limited would guarantee a line of credit and also guarantee a bonding credit, the limits of these to be determined at a later date.

A formal resolution of the directors of Newman Bros. Co. Limited dated August 14, 1979, to the Canadian Imperial Bank of Commerce recites that: "Whereas this company has business relations with Newman Bros. Limited and it is expedient and in the interest of this company to guarantee the present and future indebtedness and liability of the said Newman Bros. Limited to Canadian Imperial Bank of Commerce".

12. J.D. Newman is the president of Newman Bros. Limited and is also the executive vice-president of Newman Bros. Co. Limited and has occupied this position since January 10, 1972. Newman Bros. Limited does not have an executive vice-president. The other officers of Newman Bros. Limited are: G. B. Newman, vice-president; H. C. Newman, vice-president; F. H. Newman, chief executive officer and chairman of the Board; and J. A. Davis, secretary-treasurer. G. B. Newman was an employee and northern director of Newman Bros. Co. Limited and on January 10, 1972, F. H. Newman was appointed and remains the president of

Newman Bros. Co. Limited and at the same time H. C. Newman was appointed and remains a vice-president of Newman Bros. Co. Limited.

13. An annual meeting of the shareholders of Newman Bros. Co. Limited was held at St. Catherines on May 29, 1979. At this meeting G. D. Newman, W. C. Newman, J. H. Newman, F. H. Newman, J. D. Newman and H. C. Newman attended as shareholders of the company. In addition, G. B. Newman attended by invitation. The minutes of a directors' meeting of Newman Bros. Co. Limited which was held in St. Catherines on December 21, 1979, state, in part, that:

A general discussion took place concerning overhead expenses of the company and its successor company Newman Bros. Limited. On motion duly made, seconded and unanimously carried it was resolved that three months' rent for the office and both yards paid by the company would be charged to Newman Bros. Limited. On motion duly made, seconded and unanimously carried it was resolved that salaries for the office manager and two clerical staff paid by Newman Bros. Limited be reimbursed to that company for a three month period.

The Directors were advised that Newman Bros. Limited had arranged a line of credit of \$250,000.00 with Canadian Imperial Bank of Commerce and that Newman Bros. Co. Limited had guaranteed the bank loan to that amount. On motion duly made, seconded and unanimously carried, it was resolved that Newman Bros. Co. Limited charge Newman Bros. Limited the sum of \$1,250.00 per annum, calculated at the rate of .5% of \$250,000.00 as consideration for this guarantee, with the proviso that this charge will be subject to review in each year.

14. The evidence of Mr. Davis established that Mr. J. D. Newman had played a substantial role in both companies as an executive vice-president of one company and as president of the other company and that Mr. F. H. Newman served as an officer of both companies. The two respondents shared the same premises and these premises are used by all of the various enterprises of the Newman group of companies and proprietorships. Newman Bros. Limited rents premises from one of these proprietorships. There is no formal arrangement between the two respondents with respect to the rental of space. The employees of Newman Bros. Co. Limited who formerly operated the equipment of Lincoln Concrete Plumbing Service now operate this equipment and are employees of Newman Bros. Limited. Mr. Davis testified that practically all of the permanent employees of Newman Bros. Co. Limited were hired as employees by Newman Bros. Limited. Newman Bros. Co. Limited consented to the use of the name Newman Bros. Ltd. (later changed to Newman Bros. Limited) during the process of incorporation.

15. While Newman Bros. Co. Limited and Newman Bros. Limited did not compete with each other they were for a time operating as building contractors during the same period. Robert Pawluk is an employee of Newman Bros. Limited and was previously an employee of Newman Bros. Co. Limited. For many years remittances were made to the applicant's trust funds for pension and other benefits on behalf of Mr. Pawluk by Newman Bros. Co. Limited. Up until at least August of 1979 such remittances appear to have been made by Newman Bros. Co. Limited. After January of 1980 similar remittances appear to have been made by Newman

Bros. Limited. After the filing of this referral these remittances were discontinued. However, when it was pointed out that Mr. Pawluk's benefits would terminate under these circumstances, the remittances were continued together with the shortages owing with respect to Mr. Pawluk. The remittances have been made without prejudice to the position of the respondents in this referral.

16. Mr. Davis gave evidence that these remittances were not made pursuant to any collective agreement to which the applicant is or was a party. He informed the Board that Mr. Pawluk was a member of the Labourers' union. However, when asked why the respondents would make remittances to the applicant under these circumstances the witness was unable to answer this question.

17. Newman Bros. Co. Limited and the applicant entered into a collective agreement; which was made on April 7, 1970, and which became effective on August 25, 1970, and remained in effect until April 30, 1971, with provision for the renewal of the collective agreement from year to year thereafter unless either party furnished the other with notice of termination of, or proposed revision of the collective agreement within ninety days before April 30, 1971, or in any like period in any year thereafter. The collective agreement provided that Newman Bros. Co. Limited recognized the applicant as the sole and exclusive bargaining agent for all employees operating, repairing, maintaining and servicing of all equipment covered by the classifications of work set forth in a schedule in the collective agreement, save and except non-working foremen and persons above the rank of non-working foreman. It was also provided that the collective agreement would be effective in the Districts of Algoma, Sudbury, Manitoulin Island, Parry Sound, Nipissing, Temiskaming and Cochrane. Newman Bros., Limited and The Building and Construction Trades Council of Toronto and Vicinity signed a document entitled "Working Agreement". The Working Agreement is dated June 21, 1955, and provides that the company recognizes the Council and its affiliated unions as the collective bargaining agency for all its employees. The Working Agreement also provides that the company agrees to recognize and be bound by the agreements existing between each of the unions affiliated with the Council and the Toronto Builders' Exchange and specifically agrees that the provisions relating to wages, hours and working conditions set forth in the said agreements shall be binding on the company. The Working Agreement further provides that in the event any of the said conditions of any of the said agreements are altered or amended at any time during the currency of this agreement, the company shall be bound by such alterations and amendments. With respect to its term of operation, the Working Agreement provides that it shall remain in force for a period of one year from the date of the agreement and shall continue in force from year to year thereafter unless in any year not less than sixty days before the date of its termination, either party shall furnish the other with notice of termination of, or proposed revision of, the agreements.

18. Mr. Davis gave evidence that at one time Newman Bros. Co. Limited was a member of the Sudbury Construction Association. While the witness was not completely sure of the dates, he indicated that he believed that Newman Bros. Co. Limited had been a member from 1970 or 1971 until 1974. The evidence further established that Newman Bros. Co. Ltd. is named in a certificate of accreditation which was issued by the Board on August 24, 1973. In that proceeding before the Board, the General Contractors' Section of the Toronto Construction Association had applied on May 31, 1971, to be accredited as the bargaining agent for certain employers in the construction industry. In a decision dated August 24, 1973, the Board accredited the General Contractors' Section of the Toronto Construction Association as the bargaining agent for "all employers of operating engineers for whom the

[applicant herein] has bargaining rights in Metropolitan Toronto, the Counties of York and Peel, the Township of Esquering and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario in the industrial, commercial and institutional sector, save and except those employers of operating engineers for whom the [applicant herein] has bargaining rights who are regularly employed throughout the Province of Ontario in the erection of structural steel and mechanical equipment of the construction industry". In the certificate of accreditation the employers for whom the General Contractors' Section of the Toronto Construction Association became the bargaining agent included "Newman Brothers Co. Ltd.". It should be pointed out that the evidence before the Board in this referral indicates that a reply was filed in Form 68, Employer Intervention, Application for Accreditation, Construction Industry, in the accreditation proceeding on behalf of Mr. Davis and that the name of the employer intervener is stated as "Newman Brothers Co. Ltd.". There was no issue before the Board that Newman Brothers Co. Ltd. is not in fact the same company as Newman Bros. Co. Limited.

19. Newman Bros. Limited was performing work as a general contractor on various sites in the Niagara Peninsula, including St. Catherines during the spring of 1980. On the various projects subcontractors, which did not have a collective agreement with the applicant, performed excavation work. The work performed by these subcontractors came within the jurisdiction of the applicant. On some of these projects subcontractors which did not have a collective agreement with the applicant performed levelling and paving work which also came within the jurisdiction of the applicant. At the time the collective agreement referred to in paragraph seventeen was signed, Mr. Pawluk was the only employee who was covered by its provisions. Since the signing of that collective agreement Mr. Pawluk has not worked continuously in the Sudbury area and has, in fact, worked both within and outside the geographic scope of that collective agreement in such locations as: Sault Ste. Marie, Gravenhurst, Bracebridge, Thunder Bay, Timmins and Kapuskasing. Prior to 1970 Mr. Pawluk worked in the area of St. Catherines and Newman Bros. Co. Limited continued to pay benefits with respect to work performed in these various locations.

20. William Baird, a business representative of the applicant, gave evidence that, from his personal observations and contacts, subcontractors which did not have a collective agreement with the applicant performed work which came within the jurisdiction of the applicant for Newman Bros. Limited during the spring and summer of 1980 in the area of St. Catherines. He also gave the names of subcontractors which have collective agreements with the applicant and which are capable of performing the work which was performed for Newman Bros. Limited by subcontractors which did not have a collective agreement with the applicant.

21. John Redshaw, who is also a business representative for the applicant, gave evidence with respect to the membership of Mr. Pawluk in the applicant. Mr. Pawluk became a member of the applicant on May 7, 1958, and, at the time of the hearing had paid up his membership dues up to December of 1980. The witness also identified various collective agreements between the applicant and the General Contractors' Section of the Toronto Construction Association and between the applicant and the Sudbury Construction Association. Mr. Redshaw explained the system of remittances and the forms used for employees with respect to the applicant's trust funds for pension and other benefits. The evidence established that when the applicant's office in Toronto is notified of the payments to the various trust funds the amounts are recorded and the forms are mailed to the area offices where a given employer is working so that the applicant's representatives know that the

required amounts have been paid. The forms used for making remittances to the applicant, however, do not indicate which collective agreement is being applied. The position of the applicant in monitoring these forms is illustrated by the fact that the applicant receives each month remittance forms from more than one thousand employers.

22. Mr. Redshaw testified that Mr. Pawluk pays his union dues at the applicant's office in Sault Ste. Marie and has never processed a grievance with the applicant. Mr. Redshaw informed the Board that he is unaware of Mr. Pawluk's rate of pay and that Mr. Pawluk's entitlement to benefits is not affected by membership in another trade union.

23. Graham Newman (Mr. G. B. Newman) gave evidence before the Board. He informed the Board that he is the manager of area operations and operates out of Sault Ste. Marie. The witness informed the Board that Mr. Pawluk came to Sault Ste. Marie in 1972 and that Mr. Pawluk had previously worked for various companies in the Newman group since 1948 in Sudbury, St. Catherines, Hamilton and Toronto. Graham Newman characterized Mr. Pawluk as a labourer. However, he was not aware of the rate of pay which Mr. Pawluk received. The witness explained that Mr. Pawluk's rate of pay is based upon a collective agreement of the Labourers' Union as modified by a discussion between Mr. Pawluk, Graham Newman and Howard Newman. This discussion results in a rate of pay for Mr. Pawluk which is higher than the rate of pay provided for in the collective agreement of the Labourers' Union referred to above.

24. Graham Newman informed the Board that over the last ten years he has worked on between one hundred and two hundred jobs in the geographic area referred to in paragraph seventeen. He was unaware whether he used any members of the applicant on any of these jobs but was certain that Newman Bros. Co. Limited used subcontractors which did not have a collective agreement with the applicant for excavation and road paving. The witness gave evidence that as of the end of June of 1979 he commenced to own twenty per cent of the shares of Newman Bros. Limited. He testified that Mr. Pawluk has for the past year been engaged in performing the work of a labourer. Graham Newman gave evidence that while Newman Bros. Limited has never been a member of the Sudbury Construction Association, Newman Bros. Co. Limited has been a member of that Association for about one year between 1970 and 1971. The witness related his sole contact with a representative of the applicant in northern Ontario. On that occasion a business representative of the applicant asked for help in obtaining a certificate with respect to representing the employees of a subcontractor which was being used by Newman Bros. Co. Limited. The witness informed the business representative that he would be happy to talk to someone associated with the applicant who could perform the work for an equal sum. There was no further contact between the witness and the business representative. The applicant did not file a grievance arising out of this contact. The normal practice of Newman Bros. Co. Limited was not to employ persons who performed the work of operating engineers. Newman Bros. Co. Limited normally performed such work by using rental companies and on a subcontract basis.

25. Graham Newman gave evidence that the remittances which were made to the applicant's trust funds for pension and other benefits were made on Mr. Pawluk's request. Mr. Pawluk is an employee with many years of service with the Newman group of companies. He is clearly a versatile, responsible and a valued employee and these qualities clearly cause his employers to regard him as much more than a labourer in terms of remuneration and employment relationship.

26. Mr. Davis testified that Newman Bros. Co. Limited was deemed to have resigned its membership in the Sudbury Construction Association as of the end of 1972 when it ceased paying its membership fees and that to the best of his knowledge Newman Bros. Limited had never conducted its employees' relations pursuant to any collective agreement with the Sudbury Construction Association. He gave evidence that Newman Bros. Co. Limited has worked in the Board's geographic area #8 as recently as 1979 and used machinery and equipment of the type operated by members of the applicant. The witness informed the Board that the excavating work on the jobs performed by Newman Bros. Co. Limited in the Board's geographic area #8 was performed by subcontractors which did not have collective agreements with the applicant.

27. Mr. Davis produced evidence with respect to the wages paid to Mr. Pawluk and the other remittances paid on his behalf to the applicant's trust funds for pension and other benefits. The witness was generally unable to relate the wages and remittances to any specific time period in any collective agreement. On occasions the hourly rate paid to Mr. Pawluk appeared to resemble or approach a rate provided for in one of the applicant's collective agreements. On other occasions the remittances appeared to correlate from time to time to one or more of the applicant's collective agreements. However, the resemblances and correlations were not consistently apparent and served to establish that the wages and remittances paid to and on behalf of Mr. Pawluk were not generally paid according to one or more of the applicant's collective agreements. Indeed, the basis for the wages and remittances appeared to be based on principles and standards which were not convincingly explained to the Board.

28. Francis Giles, the president of the applicant, was the final witness to appear before the Board. He testified and proved in evidence various collective agreements which related to the work undertaken by Newman Bros. Co. Limited in the Board's geographic area #8. It was clearly established that the jobs referred to by Mr. Davis in the Board's geographic area #8 were performed by subcontractors which had collective agreements with the applicant and which employed members of the applicant to perform work which comes within the jurisdiction of the applicant.

29. The applicant argued that the respondents are related and under common control and direction within the meaning of section 1(4) of the Act and that there had been a sale of a business or sale of a part of a business between the respondents within the meaning of section 55 of the Act. The applicant asked that the Board apply the remedial provisions of sections 1(4) and 55 because Newman Bros. Co. Limited had continued its construction operations into the fall of 1980. The applicant characterized the respondents as family dominated companies which were by and large owned and controlled by Newmans and that as members of the family became older decisions were made to transfer the businesses to younger members of the family.

30. The applicant pointed to what it viewed as essentially the same personnel in terms of employees. In particular, the applicant cited the employment of Mr. Davis by both respondents to perform more or less the same job. The applicant stressed that the respondents had regarded and described Newman Bros. Limited as the successor of Newman Bros. Co. Limited, the guaranteeing of a line of credit by Newman Bros. Sco. Limited to Newman Bros. Limited, and the degree of commonality of the officers and directors of the two respondents. The applicant pointed out that J. B. Newman and J. A. Davis were only employees of Newman Bros. Co. Limited and not directors or shareholders but nevertheless were present at

important meetings of Newman Bros. Limited and that while their involvement and ownership have increased in the successor company they were still important employees of Newman Bros. Co. Limited. The applicant referred to the role of Mr. Davis as a representative bargaining agency and pointed out that the information he received in this capacity was passed on to the successor company Newman Bros. Limited. It was also stressed by the applicant that F. H. Newman, J. D. Newman and H. C. Newman were present at a shareholders' meeting of Newman Bros. Co. Limited and are directors of Newman Bros. Limited.

31. The applicant stressed the degree of overlap of the directors of H. C. Newman, J. D. Newman and F. H. Newman in the respondents and drew attention to the fact that these three persons constituted one half of the directors of the two respondents. The applicant referred to the key roles of J. D. Newman as president of Newman Bros., Limited and as executive vice-president of Newman Bros. Co. Limited, of F. H. Newman who is chairman of the board of Newman Bros. Limited and president of Newman Bros. Co. Limited and of H. C. Newman who is a vice-president of both respondents. The applicant also referred to the role of G. B. Newman as the new vice-president in Newman Bros. Limited, as the northern director of Newman Bros. Co. Limited and to his attendance at a directors' and shareholders' meeting of Newman Bros. Co. Limited.

32. It was pointed out that the respondents were both engaged in the construction business, had carried on business simultaneously and had not been competitors. The applicant recited the transferral of employees, such as Mr. Davis and Mr. Pawluk, from one respondent to the other and characterized such transferral as indicative of the performance of the same business with employees doing the same kind of work.

33. The applicant reviewed the criteria set forth in *Walters Lithographing Company Limited*, [1971] OLRB Rep. July, 406, and related the facts of this referral to criteria of: (1) common ownership or financial control, (2) common management, (3) inter-relationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. The applicant argued that the first criterion had been established up to a certain point and that the second criterion had been established by the management personnel in the positions of chairman, president and vice-president. The applicant argued that the third criterion was satisfied by the use of the same personnel and the closely related way in which the two respondents operated. With respect to the fourth criterion, the applicant referred to the use of the applicant's forms which were processed by the same personnel from the same business address and to the consent by Newman Bros. Co. Limited to the use of a similar name in the incorporation of Newman Bros. Limited and to the work of Mr. Davis in negotiations with various trade unions. In discussing the fifth criterion, the applicant referred to the presence of Mr. Davis on a committee of an employer bargaining agency as flowing from the bargaining relationships of Newman Bros. Co. Limited while he reported his information to Newman Bros. Limited. The applicant also referred to the use of common equipment and facilities by both respondents, their common solicitors and to the fact that Mr. Davis had access to, and care and control of, the financial records of both respondents.

34. While the applicant directed most of its argument to the entitlement of relief under section 1(4), it also asked for relief under section 55 although it conceded that there were conceptual difficulties with respect to relief under section 55.

35. In anticipating the arguments of the respondents, the applicant argued that it had

not abandoned its bargaining rights with respect to the employees of the respondents. The applicant adopted the position that its bargaining rights flowed from two sources, namely, the collective agreement which entered into between the applicant and the Sudbury Construction Association on April 7, 1970, and which was binding on the respondents, and, the certificate of accreditation which was issued to the General Contractors' Section of the Toronto Construction Association on August 24, 1973. With respect to this second source, it was the position of the applicant that this certificate reflected the inception of bargaining rights which arose in 1955 when the Working Agreement was signed.

36. The applicant characterized the continuing remittances by the respondents to the applicant's various trust funds on behalf of Mr. Pawluk and briefly for another employee as a key fact in a continuing relationship. The applicant viewed this as an acknowledgement of a continuing relationship between the respondents and two employees. The applicant viewed the fact that Mr. Pawluk was not always paid the rates provided for under current collective agreements as reflecting the varied nature of the work performed by Mr. Pawluk. The applicant pointed to the use of union subcontractors in the Toronto area by Newman Bros. Co. Limited as evidence of a continuing bargaining relationship.

37. The applicant relied on section 125(2) of the Act in support of its contention that the respondents are now bound by a province-wide collective agreement with respect to the industrial, commercial and institutional sector of the construction industry. Based upon this position and the evidence before the Board, the applicant asked the Board to find that the respondents have violated this collective agreement with respect to the work set forth in the grievance.

38. The respondents argued that the Newman group of companies represented parallel companies rather than successor companies. The sales which did occur were interpreted by the respondents as sales of assets rather than sales of businesses. While admitting that there was a transfer of ownership between various generations of the Newman family, the respondents stressed that many of the new shareholders were employees and that there was an eighty per cent effective change in control of Newman Bros. Limited. The respondents contended that the use of the words "predecessor" and "successor" in the minutes of directors' meetings was not the same as in section 55. The respondents argued that the fact that the two companies operated simultaneously for a period of time was not evidence of functional coherence and interdependence.

39. The respondents argued that the applicant had delayed in making this request for relief under section 1(4) and that the Board ought not to grant any relief because of the respondents' employees have not been represented by the applicant for more than ten years. The respondents also raised the question of the powers of the Board with regard to the coming into effect of sections 1(4) and 55(2) and the absence of a like bargaining unit in the circumstances of province-wide bargaining in the industrial, commercial and institutional sector.

40. The respondents argued that by its inaction the applicant had abandoned any bargaining rights which it may have held with respect to any of the respondents' employees. In the alternative, the respondents argued that the changes in *The Labour Relations Act* with respect to province-wide bargaining in the industrial, commercial and institutional sector had frustrated any collective agreements or bargaining rights which may have existed between the respondents and the applicant.

41. In order to succeed in this referral the applicant is required to establish that it has a collective agreement which one or more of the respondents have violated because of conduct in subcontracting certain work, which falls within the jurisdiction of the applicant, to employers which do not have a collective agreement with the applicant. The alleged violations occurred in or near St. Catharines and would be violations of the province-wide collective agreement in the industrial, commercial and institutional section of the construction industry. In order for the applicant to establish that such a province-wide collective agreement is binding on one or more of the respondents, it is required to establish that the provisions of section 125(2) have extended the bargaining rights which came into being as a result of the collective agreement referred to in paragraph seventeen or as a result of the Working Agreement also referred to in paragraph seventeen and as subsequently determined and acknowledged by the Board in its decision and in the certificate of accreditation dated August 24, 1973.

42. The evidence before the Board with respect to the activities of the respondents in performing work in the Board's geographic area #8 was given by Mr. Davis and by Mr. Giles. While on occasions Mr. Davis named the subcontractors used by the respondents as subcontractors which did not have a collective agreement with the applicant, Mr. Giles concurred with Mr. Davis in the names of the subcontractors and produced collective agreements between those subcontractors and the applicant. There was nothing in the evidence before the Board which indicated that the applicant had abandoned any bargaining rights it has with respect to the respondents in the Board's geographic area #8. It seems, moreover, that the respondents were only rarely directly engaged in performing for themselves work which falls within the jurisdiction of the applicant.

43. The evidence with respect to Mr. Pawluk indicates that he is a member of the applicant and a member of the Labourers' Union. The respondents have made certain remittances on his behalf to the applicant's various trust funds. It appears that Mr. Pawluk only occasionally worked as an operating engineer and this explains why there is no appreciable correlation between his hourly rate and the hourly rates provided for in the various collective agreements to which the applicant is bound. It appears that many "paper" hours were paid by the respondents to the applicant's various trust funds on behalf of Mr. Pawluk, thereby giving an inaccurate impression of the amount of work directly performed by the respondents which came within the jurisdiction of the applicant. Mr. Pawluk never complained about his representation by the applicant and never filed a grievance against the respondents. There is, however, evidence that the applicant's business representative in Sault Ste. Marie did not assert a claim to bargaining rights with respect to Newman Bros. Co. Limited. However, evidence of the history of collective bargaining with respect to the applicant and the Sudbury Construction Association is incomplete and it neither is possible nor necessary for the Board to determine whether the applicant abandoned bargaining rights which had their origin in the collective agreement which was signed on April 7, 1970.

44. The bargaining rights which were determined and acknowledged by the Board in the decision and the certificate of accreditation dated August 24, 1973, were never subsequently challenged by Newman Bros. Co. Limited. Quite clearly, Newman Bros. Co. Limited was bound by subsequent collective agreements entered into between the General Contractors' Section of the Toronto Construction Association. Reference is made to sections 117(2), 117(3) and 119 of the Act. In 1978, and subsequently, Newman Bros. Co. Limited was covered by the provincial collective agreements which were subsequently entered into. Since

the issuance of the certificate of accreditation, Newman Bros. Co. Limited has been covered by a series of collective agreements by virtue of the provisions of the Act. In our view, the applicant has not abandoned its bargaining rights with respect to the Board's geographic area #8. The facts in this referral are quite different from the facts in *Hugh Murray Limited*, [1979] OLRB Rep. July, 664, where the trade union did not serve notice to bargain on the employer for a new collective agreement and did not contact the employer at all during the period of some six years. On the facts of this referral, successive collective agreements were negotiated by the accredited employers' organization which was binding on both the applicant and Newman Bros. Co. Limited. Upon the introduction of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry, Newman Bros. Co. Limited and the applicant were bound by the provincial agreements which were concluded between the employer bargaining agency and the employee bargaining agency. On the evidence before it, the Board is not persuaded that the lack of contact between the applicant and the respondents supports a finding of abandonment of bargaining rights. The evidence before the Board establishes that Newman Bros. Co. Limited subcontracted work which comes within the jurisdiction of the applicant to employers which were bound by the provincial agreement. There were no grievances with respect to work performed by Newman Bros. Co. Limited in the Board's geographic area #8.

45. There is, in the argument of the respondents, the concept that contact is necessary in order to maintain bargaining rights. However, where an affiliated bargaining agent or an employee bargaining agent has no reason to believe that a collective agreement is not being adhered to; the scheme of collective bargaining under the Act, whether under a system of accreditation or under province-wide bargaining, is not conducive to the personal contact which was often a *sine qua non* in the jurisprudence of the Board with respect to the principle of abandonment. Indeed, the Board has noted in *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568, 572 that the lack of contact by a bargaining agent in the construction industry where there has been an absence of employees who would be covered by successive collective agreements would not support a finding of the abandonment of bargaining rights. While it may be debated that a bargaining agent might be more active and play a more investigative role in policing its collective agreements, such debates essentially relate to the adequacy or quality of representation rather than to the principle of abandonment. The disapproval of the Board with respect to the quality of representation has not in itself caused the Board to find an abandonment of bargaining rights. In this regard, see *The Borden Company Limited* case, [1976] OLRB Rep. July, 379, 382.

46. In considering the question of whether the applicant is entitled to relief under the provisions of section 1(4) of the Act, the Board has considered the question of whether the applicant acted diligently upon discovering the existence of Newman Bros. Limited. The Board is satisfied that the applicant acted diligently upon discovering the existence of Newman Bros. Limited at the first hearing of this referral before the Board. In our view, given the similarity of the corporate names of the respondents it is not surprising that the applicant was unaware of the existence of Newman Bros. Limited as a corporate entity separate and distinct from Newman Bros. Co. Limited. Indeed, there were occasions when the witnesses who gave evidence confused the names of the two respondents.

47. With respect to the criteria set forth in *Walters Lithographing Company Limited*, *supra*, the first two criteria of common ownership of financial control and common management are considered in the context of a family business. The Newman group of

companies are, from the evidence before the Board, successful commercial undertakings in various fields including the construction industry. Since the incorporation of Newman Bros., Limited in 1918 a series of companies have continuously carried on business in the construction industry and there has been a transference of ownership and management over the intervening period of time from one generation to another generation. The companies have always carried the name of Newman and have always been essentially owned and managed by members of the extended family. The degree of overlap of directors and ownership in the respondents satisfies the first and second criteria. With respect to the third criterion there is no evidence which clearly establishes an interrelationship of operations although the use of the same office staff, premises and the informal arrangement with respect to rental charges is some evidence of an interrelationship of operations, at least as far as the use of office facilities are concerned. The fourth criterion of representation to the public as a single integrated enterprise is satisfied by the use of the Newman name and the consent that this required, the guaranteeing of a line of credit and bonding, the use of the same premises and common office staff. With respect to the fifth criterion of centralized control of labour relations, there is the evidence that Mr. Davis regularly participates in employers' committees and bargaining and utilized his information with respect to both of the respondents.

48. When the evidence is viewed as a whole, the Board is satisfied that the respondents are under common control or direction and that they have been in the construction industry even though Newman Bros. Co. Limited has virtually ceased its business activities. There is no requirement that the associated or related business activities be carried on simultaneously. In these circumstances, the Board declares that Newman Bros. Limited is bound by the province-wide collective agreement that is binding on Newman Bros. Co. Limited in the industrial, commercial and institutional sector of the construction industry by virtue of the provisions of section 125(2) of the Act and which became effective on May 1, 1980, and is binding on the applicant.

49. Having regard to the foregoing, it is not necessary for the Board to determine whether there has been a sale of a business within the meaning of section 55 of the Act.

50. The Board finds that Newman Bros. Limited and/or Newman Bros. Co. Limited have violated article 3.4 of the collective agreement referred to in paragraph 47. The Board remains seized with this referral pending notification that the parties have settled the amount referred to in paragraph three.

2526-80-R The Blue Cross Employees' Association, Applicant, v. Ontario Hospital Association (Blue Cross), Respondent, v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Intervener.

Reconsideration - Trade Union Status - Whether Board reconsidering decision directing pre-hearing vote - Whether participation of minimum number of employees necessary for formation of trade union - Whether applicant having status of trade union

BEFORE: George W. Adams, Chairman and Board Members W. Wightman and O. Hodges.

APPEARANCES: *Michael G. Horan for the applicant; Douglas K. Gray for the respondent; and L. A. MacLean, Q.C. for the intervener.*

DECISION OF THE BOARD; June 25, 1981

1. This is an application for certification in which a pre-hearing vote was directed by decision dated April 9, 1981. By letters dated April 30, 1981 and June 8, 1981, the intervener requests that the Board reconsider its decision of April 9, 1981. We are not satisfied that any of the submissions therein merit such a review and the request is denied.

2. By the same decision of April 9, 1981, the Registrar was directed to relist this matter for hearing "for the purpose of inquiring into the status of the applicant and all outstanding issues." At its hearing on May 25, 1981, the Board entertained evidence and representation pertaining to the status of the applicant.

3. Miss Debbie Cowan has been employed by the respondent for three years. She is employed as a clerk in the pensions area. She is not and never has been a supervisor. She testified that she is the President of the applicant. She stated that she and Susan Traynor went to the law office of Michael Horan on January 14, 1981 at 5:00 p.m. Miss Traynor was identified as Secretary of the applicant. They wanted to know what could be done about a termination application which had been filed in respect to the same bargaining unit and dismissed. Mr. Horan advised that an application for reconsideration could be filed and inquired whether the two employees were familiar with the method by which an "employees' association" could be formed under *The Labour Relations Act*. Miss Cowan testified that she had been directed to Mr. Horan by the lawyer who had initially acted in the termination matter. Mr. Horan was instructed to file an application for reconsideration and Miss Cowan said that it was subsequently decided to form an employees' association as described by Mr. Horan.

4. Miss Cowan testified that another meeting at Mr. Horan's office was held on January 28, 1981 at about 5:00 p.m. In attendance was Miss Cowan; Susan Little (identified as Vice-President of the applicant); Leslie Ward (identified as Treasurer of the applicant); and Gwen Clay (another employee). Discussions ensued and a draft constitution and membership cards were reviewed. This meeting lasted approximately two hours. A third meeting was held at the same location on February 2, 1981 and Leslie Ward, Susan Traynor, Susan Little and Debbie Cowan were in attendance. Minutes of this meeting were filed with the Board and read:

MINUTES OF A MEETING CONVENED AT
TORONTO, ONTARIO ON THE 2nd
OF FEBRUARY, 1981

PRESENT

Debbie Cowan
Susan Traynor
Susan Little
Leslie Ward

The meeting opened with a discussion amongst the employees present regarding the merits of establishing their own union and securing the right to bargain with their employer, by way of an Application for Certification to the Ontario Labour Relations Board. The employees discussed the constitution which had been prepared by their solicitor, and distributed prior to the meeting.

A motion was made by DEBBIE COWAN and seconded by SUSAN LITTLE that the employees present constitute themselves as a trade union to be known as The Blue Cross Employees' Association in order to regulate *inter alia* wages, fringe benefits, working conditions and labour relations with their employer, ONTARIO HOSPITAL ASSOCIATION — Blue Cross. The motion was unanimously carried.

The employees present were then presented with a draft constitution which had been distributed prior to the meeting which they proceeded to discuss. At the conclusion of the discussion, it was moved by LESLIE WARD and seconded by SUSAN TRAYNOR that the draft constitution be approved. The Motion was unanimously carried.

Immediately, a meeting of The Blue Cross Employees' Association was convened. There was a discussion by persons present, and a number of the persons applied for membership in the Association. At that time, the payment of \$1.00 was made by each applicant and application for membership cards in the form annexed hereto as Schedule "A" were signed, countersigned, dated and receipts were furnished to those persons who applied.

It was then moved by LESLIE WARD and seconded by SUSAN TRAYNOR, that the new members of the Association ratify the constitution as approved previously. The motion was carried unanimously by vote of the members.

It was then moved by SUSAN TRAYNOR and seconded by SUSAN LITTLE, that DEBBIE COWAN act as Chairman of the first meeting pending election of the officers of the Association in accordance with the constitution. The Motion was carried unanimously.

The meeting was then opened for nomination of elected officers.

Nominations for the office of President were opened and it was moved by LESLIE WARD and seconded by SUSAN LITTLE that DEBBIE COWAN be so nominated. There were no further nominations and DEBBIE COWAN having accepted the nomination, she was therefore acclaimed President.

Nominations for the office of Vice-President were opened and SUSAN LITTLE was nominated by DEBBIE COWAN which nomination was seconded by SUSAN TRAYNOR. SUSAN LITTLE accepted the nomination and there being no further nominations, she was acclaimed to be Vice-President of the Association.

Nominations for the office of Secretary were opened and SUSAN TRAYNOR was nominated by SUSAN LITTLE and seconded by LESLIE WARD. There being no further nominations for the office of Secretary, and SUSAN TRAYNOR having accepted, she was acclaimed to that position.

Nominations were then opened for the position of Treasurer and LESLIE WARD was nominated by SUSAN TRAYNOR which nomination was seconded by SUSAN LITTLE. There being no further nominations for the position of Treasurer, and LESLIE WARD having accepted, she was acclaimed to that position.

All of the executive board offices of The Blue Cross Employees' Association were now filled and those persons on the executive board who were present at the meeting took the following oath of office, read to them by Michael Horan:

"I, _____, solemnly pledge my word and honour before these witnesses that I will to the best of my abilities perform the duties of my office. At the close of my official term, I will turn over to my successor all books, records and all other properties including funds of this Association that may be in my possession. I will also deliver all such properties to this Association upon lawful demand. I will at all times devote my best efforts to further the objectives and best interest of my Association."

It was moved by DEBBIE COWAN and seconded by SUSAN TRAYNOR that the meeting be adjourned at 5:30 p.m.

The aforesaid minutes have been read by the persons hereinafter designated and are verified by them as being a true and correct account of the proceedings of the meeting on the date, time and place aforesaid.

 "D. COWAN"

 "SUSAN LITTLE"

 "SUSAN TRAYNOR"

 "LESLIE WARD"

"SCHEDULE A"

THE BLUE CROSS EMPLOYEES' ASSOCIATION

APPLICATION FOR MEMBERSHIP

DATED:

SURNAME: _____ GIVEN NAMES: _____
(please print)

ADDRESS: _____

CITY OR TOWN: _____ PHONE NUMBER: _____

hereby make application to become a member of The Blue Cross Employees' Association. In doing so, I of my own free will and accord hereby authorize The Blue Cross Employees' Association and its representatives, or officers, to act for me as Collective Bargaining Agent in negotiating the relationship in all matters pertaining to rates of wages, hours of work and all other terms and conditions of my employment with my employer.

SIGNATURE: _____

Initiation Fee: _____

Signature witnessed

and Fee collected by: _____

(collector)

.....
(DO NOT DETACH)

THE BLUE CROSS EMPLOYEES' ASSOCIATION

Receipt is acknowledged of the sum of \$1.00 from _____
(name)on account of initiation fees and dues in the abovementioned Association this _____ day
of _____ A.D. 1981._____
(Applicant's countersignature)_____
(Treasurer protem).....
(DETACH AND GIVE TO APPLICANT FOR MEMBERSHIP)

THE BLUE CROSS EMPLOYEES' ASSOCIATION

Receipt is acknowledged of the sum of \$1.00 from _____
(name)

on account of initiation fees and dues in the abovementioned Association this _____ day
of _____ A.D. 1981.

(Treasurer protem)

(DETACH AND RETAIN THIS COPY)
THE BLUE CROSS EMPLOYEES' ASSOCIATION

Receipt is acknowledged of the sum of \$1.00 _____
(name)

on account of initiation fees and dues in the abovementioned Association this _____ day
of _____ A.D. 1981.

(Treasurer protem)

5. The constitution approved at the meeting was filed with the Board. The Board was advised that the Treasurer of the applicant association has opened a bank account in the name of the applicant where monies received on its behalf have been deposited.

6. It was submitted on behalf of the intervener that the applicant purported to be a trade union but in substance was not. It was submitted that the formation of a true trade union requires the involvement of more than four employees out of so large a bargaining unit. Mr. McLean argued that at best there had been only a mechanical compliance with technical formality. The applicant pointed to numerous cases where the Board had accepted the approach adopted by the supporters of the applicant in the instant case. It was submitted that *The Labour Relations Act* does not establish any specific procedure for the formation of a trade union and the Board was not permitted to establish its own standards independent of the statutes.

7. Section 1(1)(n) defines a "trade union" as:

an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions had a designated or certified employee bargaining agency.

Section 1(1)(j) defines a member of a trade union to include:

a person who

- (i) has applied for membership in the trade union, and
- (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union . . .

8. In *Local 199 UAW Building Corporation*, [1977] OLRB Rep. July 472, the Board outlined the steps which will be sufficient to establish an association as a trade union:

- “(1) A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
- (2) the constitution should be placed before a meeting of employees for approval;
- (3) the employees attending such meeting should be admitted to membership;
- (4) the constitution should be adopted or ratified by the vote of said members;
- (5) officers should be elected pursuant to the constitution.”

The procedure adopted by the four employees in this case was closely followed and approved by the Board in *Canwood Lachute*, Board File No. 1969-79-R dated February 26, 1980 (Unreported); *Cambridge Motor Hotel*, [1980] OLRB Rep. Dec. 1725; and *Sutton Tool & Die Manufacturing Co. Ltd.*, Board File No. 1277-80-R dated Dec. 5, 1979 (Unreported). And while this format will insure trade union status, it is not to be construed as the exclusive procedure. In *Local 199 UAW Building Corporation*, *supra*, the Board stated:

“14. More recently the Board in *Charterway Transportation Limited*, (File No. 0310-77-R dated June 24, 1977), affirmed the same principle, that is, that the strict adherence to the technically proper sequence of the acts is not mandatory when all the steps are carried out in a single meeting.”

9. There is nothing in the legislation which prevents four employees properly forming themselves into an association having the status of a trade union within the meaning of the Act. It is our view that the procedures adopted in the instant case were sufficient and we therefore find the applicant to be a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

10. The matter has been relisted to deal with all outstanding issues.

No. 2524-80-U The Canadian Union of Public Employees, Local 870, Complainant, v. The Perley Hospital, Respondent.

Lockout-Practice and Procedure-Hospital not recalling employees after end of illegal strike-Discharging six other part-timers-Whether bona fide disciplinary action or designed to frighten employees away from lawful union activity-Whether unlawful lockout -Whether discrimination against unlawful strikers violates Act-Whether Board deferring to arbitration.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and D. B. Archer.

APPEARANCES: *Denis Power and Michael Hurley for the complainant; D. Churchill-Smith, J. A. Roffey and R. Charette for the respondent.*

DECISION OF VICE-CHAIRMAN M. G. PICHER, AND BOARD MEMBER F. W. MURRAY: June 30, 1981

1. By this complaint, filed under section 83 of *The Labour Relations Act*, the Canadian Union of Public Employees, Local 870, (hereinafter "the union") alleges that the respondent, Perley Hospital (hereinafter "the Hospital") has unlawfully locked out some thirty-eight employees as a reprisal for their participation in a recent unlawful strike. It requests a declaration that the Hospital has violated the Act and an order reinstating the employees with compensation.

2. The Perley Hospital is a chronic care hospital in Ottawa with a patient capacity of 215 beds. It is a hospital particularly reliant on nursing services. More than half of its patients are over 80 years of age and some 40 per cent have suffered strokes with residual paralysis. Approximately half of the patients are unable to feed themselves and only 2% are able to walk on their own. While some 40 beds are devoted to rehabilitation care, the bulk of the hospital's capacity is dedicated to chronic care. It is a nursing-intensive institution responsible for the long term care of the aged and chronically ill.

3. The Hospital's nursing staff ratio reflects that reality. Before the strike, the details of which are outlined below, the Hospital had some 170 full-time employees in the bargaining unit represented by the union. Over 60% of the bargaining unit were employed in a para-nursing capacity, thirteen as registered nursing assistants and eighty-three as nursing assistants. Nursing services which were then overseen by nineteen registered nurses and four head nurses were supplemented by a number of part-time nursing assistants. 77% of the nursing care staff of the Hospital was comprised of nursing assistants and registered nursing assistants represented by CUPE. The bargaining unit also includes housekeeping, kitchen and maintenance staff.

4. Collective bargaining for the employees of the Perley Hospital is governed by *The Hospital Labour Disputes Arbitration Act*. That statute views hospital employees as performing an essential service, and makes it unlawful for them to strike. It requires hospitals and their employees to resolve any bargaining difference that lead to impasse by resort to interest arbitration.

5. Bargaining for the Hospital's employees takes place at two levels. Wages and

benefits are negotiated in unified central bargaining involving sixty-six hospitals in Ontario whose employees are represented by CUPE. Local 870, made up exclusively of the employees of the Perley Hospital, is represented in those province-wide negotiations. It also bargains locally through its own bargaining committee on certain working conditions and other local issues particular to the Perley Hospital.

6. In the fall of 1980 the union was involved in negotiations at both levels on behalf of the full-time employees. It had also given notice to bargain for the first time on behalf of the part-time employees for whom it was certified as bargaining agent on May 6, 1980. Little real bargaining took place in the part-time unit, which was to be done on a local basis, pending completion of the pattern-setting negotiations for the full-time employees.

7. In central bargaining on September 25, 1980 the hospitals made a contract offer which was accepted by the union's central bargaining committee. It was subsequently rejected, however, by the union membership throughout the province. When the efforts of mediators failed to resolve the problem the hospitals moved to submit the dispute to final and binding arbitration. Motivated by a belief that past arbitration awards had unduly held back their wages and benefits in relation to the cost of living and in comparison to settlements obtained by other groups of employees, the membership at some 51 hospitals represented by CUPE, approximately 13,000 employees, voted on January 15, 1980 to strike. The strike commenced just after midnight on the morning of January 26, 1981. At the Perley Hospital it continued until February 3, 1981.

8. It is common ground that the strike was unlawful and that it was undertaken in the face of an Order of this Board, on a complaint by the hospitals under section 82 of the Act, (Board File 2174-80-U, decision dated January 23, 1981). Prior to the commencement of the strike the Board ordered, among other things:

That the respondent C.U.P.E. and the respondent local trade unions through their responsible officers, officials and agents;

- (i) cease and desist from threatening to call or authorize an unlawful strike and from any and all activity in furtherance of an unlawful strike or the threat of an unlawful strike.

9. The evidence establishes that the president of Local 870, Mr. Michael Hurley and other officers of the local were aware of the Board's Order and that they continued to encourage, and ultimately proceeded to organize and direct, the strike at the Perley Hospital.

10. The strike had an immediate and heavy impact on the Hospital. Because of the near-invalid state of its patients the Hospital was extremely affected by the withdrawal of the bulk of its nursing, housekeeping, kitchen and laundry support services. In anticipation of the strike it made arrangements to transfer as many patients as possible to other hospitals, to nursing homes and to the homes of their families. By January 26th it had reduced the number of its patients from two-hundred and two, to one-hundred and seventy. One-hundred and fifty-five of the one-hundred and seventy full-time employees participated. As the strike continued its dislocation became more felt, and the number of patients at the Perley Hospital was eventually reduced to one-hundred and seven by February 2, 1981. The Hospital was able to care for that number only because of the enlistment of a substantial number of unpaid

volunteers and the ability to contract out a certain amount of its nursing services. The evidence of Mr. Robert Charette, Administrator of the Hospital, is that without the contribution of the volunteers and the recruitment of contract nursing staff the hospital would have been forced to close.

11. When the strike ended the Hospital imposed disciplinary sanctions on employees, both full-time and part-time, who participated. Mr. Michael Hurley, the president of the local and Ms. Sheila Casey, its vice-president, were discharged. Four members of the union executive received ten day suspensions. Employees in the full-time bargaining unit who participated for the entire duration of the strike received three day suspensions. Employees who participated in the strike for any lesser period were given one day suspensions. In addition six part-time employees who did not appear for scheduled duty during the strike, and whom the Hospital maintains did not provide adequate notice or excuse, were discharged. Except for the discharge of the six part-time employees, the discipline imposed in the wake of the strike is not a part of this complaint. It is proceeding separately to arbitration.

12. The primary basis for this complaint is that after the strike, in addition to imposing disciplinary sanctions, the Hospital failed to recall some thirty-eight employees. The union maintains that while the Hospital has resumed normal operations it has unlawfully refused to recall these employees, all but one of whom are nurse's aides. It maintains that in so doing, and in discharging the six part-time employees, the Hospital has locked them out contrary to section 8(1) of *The Hospital Labour Disputes Arbitration Act*. It submits that the discharge of the part-time employees and the failure to recall the full-time nurse's aides is a reprisal for the illegal strike. The union submits that the employer's action in this regard is calculated to go beyond the scope of disciplinary redress for the strike and is intended to frighten employees from associating with the union or participating in its lawful activities, contrary to sections 56 and 58 of *The Labour Relations Act*.

13. The union is in an unusual position. Having admittedly encouraged and implemented an unlawful strike, it pleads that the Hospital's failure to recall the employees is an unfair labour practice from which it should be protected. It goes without saying that *The Labour Relations Act* protects the lawful activities of unions and their members from interference at the hands of their employer. It is just as clear that the unlawful acts of a union or of the employees represented by it are not protected by the Act. If an employee is discharged for the sole motive that he participated in an unlawful strike, that employee cannot succeed on a complaint that his rights under the Act have been violated. He may, of course, have separate recourse under the disciplinary provisions of a collective agreement.

14. By the same token, a violation of the Act by an employee does not give an employer a license to depart from the requirements of the Act and engage in unfair labour practices of its own. If a group of employees have engaged in an illegal strike an employer may have cause to discharge them as a disciplinary response. If in fact discharges are imposed which are out of proportion to the infraction or to the degree of involvement of the employees concerned and are in reality calculated to rid a workplace of its union leaders, to crush union fervour and to discourage normal, lawful union activity among employees, the employer has crossed the line. It cannot impose unfair labour practice discharges in the guise of normal discipline nor can it implement an illegally motivated lay off in the guise of a normal business decision.

15. In this case the union alleges that the failure to recall the employees after the strike

was in effect a lay off deliberately structured to keep the union's executive officers from returning to work, and calculated to chill lawful union activity among the employees. The issue, therefore, is whether the failure to recall the thirty-eight employees and the discharge of the six part-time employees are unlawfully motivated to achieve these ends. It can only be resolved by close scrutiny of the evidence.

16. The Hospital objected to the Board dealing with the question of the recall. A grievance has been filed in respect of that issue by the union alleging that the recall has been implemented in a manner inconsistent with the collective agreement. On that basis counsel for the Hospital urged the Board to decline to hear this complaint, and to defer to the jurisdiction of a board of arbitration under the collective agreement. Having reserved on that objection at the hearing, we must now state that we cannot agree with the Hospital that this should be treated as a matter exclusively for arbitration. While it may be that there are genuine issues as to whether the collective agreement has been violated, issues which in our view should be dealt with by a board of arbitration, we are seized with the separate and equally vital question of whether the Hospital has violated a statute of general application in its dealings with employees in the aftermath of the recent hospital strike. Issues of that kind have been entrusted by the Legislature to this Board as a matter of public interest. For reasons which this Board has previously articulated, we are satisfied that these issues, touching as they do the application and administration of *The Labour Relations Act*, should not be delegated to a board of arbitration whose procedures, jurisdiction and remedial powers are more narrowly circumscribed. (See *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). In the instant case, the complaint seeks prompt relief for a large number of employees who are allegedly locked out. The case, if proved, would justify broad remedial relief not normally available elsewhere, including a posting order to redress the position of the union and its executive as well as a cease and desist order of the Board which would be registered by the Board directly in the Court. In these circumstances the Board should not defer to arbitration.

17. Robert Charette, the Administrator of the Hospital, gave evidence respecting the recall of employees following the strike. His evidence establishes that in the period immediately after the strike forty employees were not recalled. By the Board's hearing on April 3, 1981, twenty-eight were still on lay-off.

18. Mr. Charette stated two reasons for the change in manpower. The first reason was the implementation of certain renovations to the Hospital. From as early as September of 1980 the Hospital had begun planning for certain fire safety renovations and other general renovations to its physical facility. On December 14th the executive committee of the Hospital's board of directors gave the go ahead to making fire safety improvements in linen and garbage chutes. It was anticipated that the renovations would cause a reduction in beds. The Hospital wished to see a temporary reduction of 12 beds during the fire safety renovations that were to take place in the short run, and the permanent elimination of 12 beds after the longer term general renovations were completed. The Hospital did not receive the approval of the Ottawa-Carleton Regional District Health Council for the permanent closure of 12 beds, but it was eventually given the council's endorsement to temporarily close 12 beds for the time required to effect the fire safety renovations.

19. While a temporary reduction of beds might be expected to account for a lay off, it is not entirely clear to this Board that the renovations were the cause of the Hospital's failure to recall employees after the strike. As late as April 16, 1981, the final day of the Board's hearing,

no actual renovation work had begun. Moreover, the ratio of nursing staff to patients remained constant both before and after the strike. So have the absolute numbers. Mr. Charette's evidence establishes that while thirty-seven nurse's aides were not recalled after the strike, in the same period a total of thirty-eight new registered nurses and registered nurse's aides were newly hired. It appears that the renovations became an issue principally because the Hospital, whether out of diplomacy or a lack of it, told the affected employees that impending renovations were the reason for their lay off.

20. The more substantial cause for the failure to recall the nurse's aides, and the second reason advanced in this hearing, is that the Hospital took advantage of the strike to upgrade the quality of its nursing staff and, by so doing, to protect itself in the event of another strike by the union. It appears that the Hospital has been concerned for some time about the unduly high proportion of nurse's aides to registered nurses in its nursing staff. Before the strike the staff caring for two-hundred and fifteen patients over a twenty-four hour period was ninety-nine people. Of that number nineteen were registered nurses and four were head nurses, meaning that only 23% of the nursing staff were registered nurses. Of the remainder, 9% were registered nurse's aides, meaning that 78% of the nursing staff were in the least qualified level of nurse's aide.

21. In this respect the Hospital was substantially behind other chronic care institutions in the Province. The mean percentage of graduate nursing staff to total nursing staff in similar hospitals in Ontario was 37.14% as compared to 23.00% for the Perley Hospital. In fact the Hospital stood next to last in this regard among the nineteen public chronic, convalescent and rehabilitation hospitals in the Province. At least six comparable institutions had a registered nurse staffing ratio in excess of 40%. For some time the Hospital had been concerned that a disproportionate amount of bedside care was being given by unlicensed staff in circumstances that overloaded the supervisory capacity of its existing complement of registered nurses. The gravity of the situation was first brought to Mr. Charette's attention in the autumn of 1980 by Mrs. Dora Brown, the then newly appointed Associate Directrix of Nursing.

22. The strike gave the Hospital what it saw as a ready opportunity to move on the problem. In implementing the recall it resolved to raise its ration of registered nurses from 23% to 40%, and to upgrade its non-graduate nursing staff by replacing nurse's aides by registered nurse's aides until the Hospital had equal numbers of each. The increased cost of the upgrading was offset in the short run by the approved temporary reduction in bed capacity by twelve. Based on accreditation standards the Hospital expects its temporary bed reduction to become permanent. Since the Hospital's provincial funding formula is based on its staffing levels for the previous year, and not on its complement of beds, it could make the adjustment without any financial impediment. To this extent, there may be some causal connection between the temporary bed reduction due to the fire safety renovations, and the failure to recall the nurse's aides.

23. Following the strike, between February 11, 1981 and April 13, 1981 after advertising for nursing help in Ottawa, Renfrew, Belleville and Kingston, the Hospital hired twenty-five registered nurses as well as thirteen registered nurse's aides. Both the registered nurses and the registered nurse's aides hired were additions to the existing complement in those categories. Three of the registered nurse's aides hired previously worked part-time.

24. The Hospital's implementation of the recall is consistent with the explanation given

by Mr. Charette. The evidence establishes that with the exception of one orderly, not challenged by the union as being significant, all registered nurse's aides, orderlies, dietary staff, housekeeping personnel, laundry staff and maintenance employees who participated in the strike were recalled. Among non-nurse's aides recalled were orderly Joe Dempsey and kitchen worker Keith Gaines, both of whom were picket captains during the strike, and dietary aide Debbie Kelly, who was both a union steward and a picket captain.

25. With the one exception mentioned all of the employees not recalled were nurse's aides. A substantial number of nurse's aides who participated in the strike were recalled. It is clear from the evidence that they were recalled in order of seniority. The nurse's aides who were not recalled are the most junior and correspond in number to the registered nurses and registered nurse's aides who were newly hired.

26. The thrust of the union's argument is that the recruitment of registered nurse's aides and registered nurses was surreptitiously structured to cut off the recall of nurse's aides so as to keep the majority of the union executive from returning to work. That conclusion is difficult to support on the evidence. The discharge of union officers Hurley and Casey was an open gesture of discipline. It could not be described as a surprise. On the occasion of an earlier dispute Mr. Hurley had persuaded a group of registered nurse's aide students in training not to cross the informational picket line to work in the Hospital. At that time, in a letter dated November 22, 1979, Mr. Hurley was given a warning by Mr. Charette that he would be dismissed should he at any time encourage or organize an illegal walkout. On January 22, 1981 the Hospital addressed a letter to Ms. Casey stated that the Hospital would view seriously any failure of union officers to comply with an Order of this Board. The discharges of Hurley and Casey, whatever their merit at arbitration, were neither devious nor unexpected. They were, on the whole, consistent with the firm stance which the Hospital took towards the union's officers throughout.

27. Apart from Hurley and Casey there were seven full-time employees in the union's executive. Four of these were not recalled after the strike, all of them among the most junior nurse's aides. The three most senior of the seven were recalled. Membership secretary Elizabeth McKenzie, who participated in the strike, received a 10 day suspension. The union's treasurer, Cathy McLeod and sick committee chairperson Gordon Hodgins received no discipline, both having medical certificates for their absence during the period of the strike. Of six union stewards among the full-time employees all but one was recalled. The one steward not recalled, Heather Seigny, is the third most junior nurse's aide in the Hospital, having been hired September 18, 1980.

28. The evidence is clear that only the thirty-seven most junior nurse's aides who participated in the strike were not recalled. Four of the nine members of the full-time employee's executive and one steward were caught by the Hospital's decision. The evidence would suggest that they have not been recalled not because they were union officers, but because they are all junior nurse's aides. Senior nurse's aides who participated in the strike are back to work, as are all registered nurse's aides who struck. Picket captains in a number of classifications, including nurse's aides, have been recalled as have union stewards.

29. The Hospital has come forward with compelling evidence, including statistical data, correspondence and the minutes of meetings, to substantiate why the nurse's aides have not been recalled after the strike. Mr. Charette acknowledged candidly that the strike was a motivating factor. The low complement of registered nurses (who are in a separate bargaining

unit represented by the Ontario Nurse's Association) at the time of the strike left the Hospital more vulnerable to a walkout. The Hospital therefore took a step it had already been contemplating for health care reasons, in the further knowledge that upgrading the ratio of registered nurses would give it greater protection in the event of a similar strike in the future.

30. The Hospital was also candid in acknowledging that it had favoured non-striking nurse's aides in implementing the lay-off. It does not deny that there are two nurse's aides who have not been laid off even though they are junior to some nurse's aides who have not been recalled. The only distinguishing factor is that the two nurse's aides in question, Mary McDonald and Constance Jackson, worked throughout the strike. The union argues that on a proper application of the lay-off provisions of the collective agreement these two junior nurse's aides should be laid off in favour of two more senior employees. The Hospital replies that this is a recall, and not a lay-off, so that those provisions do not govern. It maintains that in any event it can properly reward employees who refused to strike illegally.

31. In our view the propriety of favouring the two non-striking employees is not an issue which this Board should decide. Putting the case at its strongest, two nurse's aides senior to McDonald and Jackson have been discriminated against on the basis that they have participated in an illegal strike. Whatever their rights under the collective agreement, it is axiomatic that they have not been negatively dealt with because they have exercised any right under *The Labour Relations Act* or, for that matter, under the collective agreement. They cannot, therefore, invoke the protection of the Act for what they have done or to shield them from what their employer has done. The Board's conclusion in this regard is obviously without prejudice to such rights respecting lay off and recall as may be found in the collective agreement between the Hospital and the union. That is a matter for arbitration.

32. The way in which the union dealt with the six part-time employees who were fired has caused the Board considerable concern. Unlike the full-time employees, the part-time workers have not yet concluded a first collective agreement. They do not, in other words, have any recourse to arbitration respecting their discharge, in the way that Mr. Hurley and Ms. Casey have. According to their evidence the part-time employees who participated in the strike were given no explanation by any union officer of the special jeopardy they would place themselves in if they joined the strike.

33. It appears that the union executive encouraged the part-timers to join the ranks of the strikers. The following notice, on union letterhead, was distributed to the part-time employees:

NOTICE FOR PART-TIME CUPE 870 MEMBERS

We of the Executive strongly urge you not to cross the picket line. You are a part of this local and whatever we gain is for your benefit as well and will have a direct effect on your negotiations.

If you must work, then do your regular shift (4:30-7:00 or 4:15-7:15 only). Any overtime work is scabbing.

We thank you for your support.

The Executive
CUPE 870

While it is not clear whether all of the union executive were aware of the content of the notice, it is clear that the union's officers knew that part-time employees were joining the strike and that they made no attempt to dissuade them or to explain the harsher consequences that could await them.

34. Each part-time employee who struck or was believed by the employer to be supporting the strike, was fired. The evidence establishes that in discharging the part-time employees the Hospital simply applied its established practice of terminating, or deeming to have quit, any part-time employee who failed, without notice or reasonable excuse, to show up for work as scheduled. The unchallenged evidence is that that was the Hospital's practice prior to the strike, and that it was applied without variation during the strike. That should not be surprising, since the corps of eighty part-time employees took on an added importance to the Hospital during the walkout. It appears that the Hospital mistakenly concluded that two part-time porters, brothers Nick and Nando Ferrinaccio, were participating in the strike. While their discharge does not disclose a breach of *The Labour Relations Act*, it is to be hoped that the Hospital will reconsider their termination.

35. On the foregoing evidence, the burden of the complaint is to establish on the balance of probabilities, that the six part-time employees discharged and the thirty-seven full-time nurse's aides not recalled were unlawfully locked out. Specifically, the Board must be satisfied that the Hospital had, in the words of section 1(1)(i) of *The Labour Relations Act*, refused "to continue to employ a number of [its] employees... to compel or induce [its] employees, to refrain from exercising any rights or privileges under this Act."

36. We must conclude that the evidence falls far short of establishing a deliberate scheme of freeze out the union executive and chill lawful union activity among the employees. As the Board has noted, numbers of striking employees, including union leaders, have been recalled. Even if we accept, as we do, the evidence of Mr. Charette that the Hospital's decision to restructure its nursing staff was partly prompted by the strike and even if we go further and accept, as the union suggests, that there was a measure of reprisal for the illegal strike in the decision to lay off the thirty-seven nurse's aides and discharge the six part-time employees, the union has made out a case to establish an unlawful lockout. What compulsion has resulted from the lay off? The lesson, if any, that the alleged reprisal would bring home to the employees is that an unlawful strike can have serious consequences for the employees involved. Even supposing that there was an element of reprisal in the Hospital's decision, we fail to see how its action could be seen as tending to discourage any law abiding employee or union officer from engaging in the *lawful* activities of the union. Alternatively, if the evidence is viewed as establishing that the failure to recall the nurse's aides was intended as an indirect form of massive discipline, the validity of such a sanction would be a matter for arbitration under the collective agreement. It would not establish a lockout within the meaning of the Act. (cf. *Ralph Milrod Metal Products Ltd.*, [1977] OLRB Rep. Feb. 79 at 91).

37. In our view the evidence establishes that the Hospital took advantage of the strike to advance its own best interests. It used the occasion to hire twenty-five registered nurses, thereby upgrading its nursing staff and giving itself further protection against the possibility of a future strike by its nursing support staff. It also increased its complement of more qualified registered nursing assistants. It was not a dispassionate decision. There is little doubt that angered by the strike and its impact on its invalid and elderly patients, the Hospital saw little reason to be particularly charitable towards its striking employees in re-ordering its own affairs. That

should not be surprising; the capacity for emotional response is not exclusive to employees. Whatever may be the economic justification for the union's strike or the hardship on the employees not recalled, the reaction by the Hospital is not unlawful. The evidence before the Board does not support a conclusion that the Hospital has engaged in an unlawful lockout.

38. Counsel for the Hospital submits that the Board should dispose of the application on a separate and alternative basis. He submits that the Board should not lend its discretion to assist the complainant even assuming the application had some merit. He maintains that in exercising its discretion to remedy an unfair labour practice the Board should be satisfied that the party seeking its assistance comes to it with clean hands. The complainant in this case was recently before the Board as the respondent in an unlawful strike application. Counsel for the Hospital stresses that following that application the union now before us and its officers knowingly and deliberately violated the Board's prompt and unequivocal order to cease and desist from all activity in furtherance of the unlawful strike.

39. There is some precedent for that submission. In *York County Board of Education*, [1980] OLRB Rep. July 1154 at p. 1164, the Board made the following observation in declining to make a declaration of an unlawful lockout against a school board under *The School Boards and Teachers Collective Negotiations Act*, 1975;

This Board's authority to grant a declaration and compensation in the event of an unlawful lock-out under the Act is discretionary, just as it is under the like provisions of *The Labour Relations Act*. When either an employer or employees come before the Board requesting extraordinary relief in the event of an illegal strike or lock-out, before granting any relief the Board must look to the whole of the circumstances, including the conduct of the complainant. Where the party requesting relief has so conducted itself as to unduly provoke the act of which it complains, there may be no good industrial relations reason to grant it relief. On the contrary, there can be ample policy reasons not to. Our discretionary remedies should not be meted out in a way that unduly shelters a complainant by absolving it from the consequences of its own excesses. (*Northdown Drywall and Construction Limited*, [1972] OLRB Rep. June 666; and see also *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Nov. 868 at 872-730.

40. These considerations can be brought to bear against an employer whose excessive conduct has provoked an unlawful strike. We agree with counsel for the Hospital that they are no less available against a union whose excesses have provoked an unlawful lockout. In the circumstances of this case, however, the matter being clearly disposed of on its merits, we find it unnecessary to make any further comment in this regard.

41. For the foregoing reasons the complaint is dismissed.

DECISION OF BOARD MEMBER D. B. ARCHER;

1. On the evidence before the Board, I cannot disagree with the legal conclusion of the majority. I have a further comment, however.

2. Labour relations is a human as well as a legal endeavour. In my view, the reaction of the Hospital was an opportunistic and arbitrary response to a situation that called for understanding and restraint. The draconian measures the Hospital has seen fit to inflict on the least of its employees are devoid of labour relations merit. They set a negative tone that could bring harm to both the Hospital, its employees and its patients for a long time to come.

0450-81-R Canadian Union of Operating Engineers and General Workers, Applicant, v. The Board of Governors of The Riverdale Hospital, Respondent, v. The Toronto Civic Employees, Local 43 of The Canadian Union of Public Employees, Intervener.

Certification-Displacement application filed same day conciliation officer-Whether application timely-Effect of section 9(2) of *Hospital Labour Disputes Arbitration Act* considered

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members O. Hodges and W. H. Wightman.

DECISION OF THE BOARD; June 17, 1981

1. The name of the respondent is amended to read: "The Board of Governors of The Riverdale Hospital".
2. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken.
3. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.
4. The intervener contends that the application is untimely by operation of section 53 of *The Labour Relations Act*. The intervener submits, in support of this contention, that the application was made May 28, 1981, the same date when the Minister of Labour for Ontario appointed a conciliation officer to confer with the intervener and the respondent and to endeavor to effect a collective agreement between them. The intervener submits further that the Board should seal the ballot box following the taking of the representation vote and schedule the application for hearing so that the parties may make their submissions on the issue of timeliness. The applicant takes the contrary view that the application is timely and that the Board should determine the issue of timeliness without putting the application on for hearing.
5. Since the respondent herein operates a hospital within the meaning of *The Hospital Labour Disputes Arbitration Act*, certain aspects of the collective bargaining relationship of the parties is regulated by that statute. Timeliness of representation applications is one such

aspect and where parties are duly negotiating for the renewal of a collective agreement, as in the case with the respondent and the intervener, subsection 2 of section 9 of *The Hospital Labour Disputes Arbitration Act* governs the question of their timeliness. It provides that "Notwithstanding section 53 of *The Labour Relations Act*, . . . , an application for certification of a bargaining agent of any of the employees of the hospital in the bargaining unit defined in the collective agreement . . . shall not be made after the day upon which the agreement ceased to operate or the day upon which the Minister appointed a conciliation office, whichever is later, . . .". The application and the copy of the letter appointing the conciliation officer which was filed with the respondent's reply establish, *prima facie*, that the application was made on the same date as the conciliation officer was appointed. Since the collective agreement expired December 31, 1980, the date of appointment of the conciliation officer is the date by which timeliness is to be determined pursuant to section 9(2). Since the application was made on the same day as the officer was appointed and not " . . . after the day upon which . . . the Minister appointed a conciliation officer, . . ." the Board finds the application to be timely within the meaning of subsection 2 of section 9 of *The Hospital Labour Disputes Arbitration Act*.

6. Therefore, having regard to the agreement of parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All maintenance employees of the Respondent save and except foremen, persons above the rank of foreman, nursing, administrative, office and clerical employees, security guards, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees falling within the scope of collective agreements between the Hospital and the Canadian Union of Public Employees, Local 79 and the Canadian Union of Operating Engineers and General Workes Local 101.

7. For purposes of clarity, the Board notes the agreement of the parties that, while the collective agreement between the intervener and the respondent describes the bargaining unit differently than the voting constituency described above, the description of the voting constituency includes exactly the same employees as are represented by the intervener pursuant to its collective agreement with the respondent.

8. The Board directs that should Mr. T. Keenan present himself at the polling station, he shall be permitted to vote and his ballot shall be segregated and not counted pending further direction by the Board.

9. All employees of the respondent in the voting constituency on the 9th day of June, 1981, who have not voluntarily terminated their employment or who have not been discharged for cause between the 9th day of June, 1981, and the date the vote is taken will be eligible to vote.

10. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

11. The matter is referred to the Registrar.

1984-80-R The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494; 1007; 1410; 1425; 1592; 1916 and 2309, Applicant v. **Rockwell International Corporation** Graphic Systems Division, Respondent, v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and its Locals 61, 1941, 1297 1067 and 127, Intervener #1, v. Progressive Lodge No. 126, International Association of Machinists and Aerospace Workers, Intervener #2.

Collective Agreement-Trade Union Status-Intervener raising agreement as bar to certification application-Intervener not having permanent residence in Ontario- Whether having status as trade union-Whether viable entity-Whether document signed outside province a collective agreement-Whether open-ended scope clause acceptable

BEFORE: Ian Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

***APPEARANCES:** Douglas J. Wray, John H. Irvine and Harry Carruthers for the applicant; H. A. Beresford, W. J. Hayter, Robert Ostrovitz and Al Fisher for the respondent; H. P. Rolph, Bill Zilio, Lorna Moses and Bob Farrel for intervener #1; R. Hayes and A. Walker for intervener #2.*

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBERS H. J. F. ADE; June 8, 1981

1. The name: "Rockwell International — Graphic Systems Division" appearing in the style of cause of this application as the name of the respondent is amended to read: "Rockwell International Corporation Graphic Systems Division".
2. This is an application for certification filed pursuant to the construction industry provisions of *The Labour Relations Act*. By way of this application the applicant is seeking to be certified to represent a unit of millwrights and millwrights' apprentices in the employ of Rockwell International Corporation Graphic Systems Division ("Rockwell International") in the Province of Ontario.
3. Rockwell International is a company incorporated in the United States of America with its corporate headquarters at Pittsburgh, Pennsylvania. Affiliated with Rockwell International is Rockwell International of Canada Limited, a firm incorporated in Canada which carries on manufacturing operations at a number of locations in Ontario. The United Automobile Workers ("U.A.W.") represents certain employees of Rockwell International of Canada Limited and intervened in the proceedings out of a concern that the application might affect its own bargaining rights. However, once assured that the applicant was not seeking bargaining rights with respect to Rockwell International of Canada Limited, the U.A.W. withdrew from active participation in the proceedings.
4. Rockwell International engaged in a variety of operations through several different divisions. The instant application is concerned only with its graphic systems division which is

headquartered in Chicago, Illinois. Rockwell International's graphic systems division manufactures and installs large modern printing presses. During the month of December, 1980, a crew of employees of Rockwell International were engaged in the installation of a press for Web Offset Publications Ltd. in Pickering, Ontario. While so engaged, certain of these employees signed applications to become members of one of the constituent locals of the applicant council of trade unions and on this basis the applicant filed its application for certification.

5. Counsel for Rockwell International raised a number of objections to the application for certification, including an allegation that the employees who had signed the applications for membership filed by the applicant did so under the impression that the documents were temporary work permits. However, on agreement of the parties, the Board first dealt with yet another objection to the application, one supported by Progressive Lodge No. 126, International Association of Machinists and Aerospace Workers ("Lodge No. 126"). This objection was based on the claim that the employees in question are already covered by a subsisting collective agreement between Rockwell International and Lodge No. 126 which is not due to expire until November 1, 1981 and that accordingly the application is untimely. The applicant acknowledges that if the agreement in question is recognized as a valid collective agreement covering the employees of Rockwell International while working in Ontario, then its application for certification is untimely under section 5 of the Act. However, the applicant submits that the agreement is not a valid collective agreement in Ontario on the grounds that since Lodge No. 126 has no permanent presence in Ontario, it cannot be a trade union under *The Labour Relations Act*, and accordingly cannot enter into a collective agreement valid in Ontario. In addition, the applicant contends that the Board should not recognize an agreement executed outside of the province as a collective agreement under the Act.

6. Lodge No. 126 is based in Bellwood, Illinois, a suburb of Chicago. The Board heard extensive evidence concerning the structure and history of the Lodge, as well as its role as the bargaining representative of "press erectors", skilled individuals who are engaged in the installation and repair of large printing presses. When installing presses, these press erectors appear to perform the same general types of functions as are performed by millwrights when they install other types of equipment. We are satisfied that much, if not all, of the installation work performed by press erectors represented by Lodge No. 126 is work within the construction industry as that term is defined in section 1(1)(f) of the Act.

7. From its early beginning, the International Association of Machinists and Aerospace Workers ("I.A.M.") has represented a number of construction industry employees. However, over the years the union has evolved into what is essentially an industrial trade union. In Canada only one British Columbia Lodge of the union remains active in the construction industry. At the hearing, Mr. A. Walker, an international representative of the I.A.M., indicated that no Ontario based Lodge of the union has been signatory to a construction industry collective agreement since 1940. Although no direct evidence was led on this point, we received the impression that only a relatively small number of lodges of the union in the United States are still active in the construction industry. Lodge No. 126 is one of the I.A.M.'s "construction lodges", and its members appear to be primarily engaged in work that falls within the construction industry. The Lodge is affiliated with the Chicago and Cook County Building and Construction Trades Council. The total membership of the Lodge is 936, of whom approximately seventy-five are employed as press erectors by Rockwell International. The Lodge also has as members a small number of "independent" press erectors who work primarily on installation of second-hand presses.

8. Prior to 1972 there were three major companies in North America engaged in the manufacture and installation of large presses. At least one of these companies was based in Chicago. Lodge No. 126 had collective agreements covering press erectors with two of these companies as far back as 1942. The third company apparently never did sign a collective agreement with the Lodge, although it only employed press erectors belonging to Lodge No. 126 and it paid them pursuant to the terms of the agreements with the other two firms. The evidence indicates that press erectors belonging to the Lodge have for at least the past thirty-four years installed presses outside of the Chicago area.

9. In 1972 the three press manufacturing firms became part of Rockwell International. This made Rockwell International the world's pre-eminent manufacturer and installer of large presses. The company installs presses throughout the world, including in such far off locations as South America and the Soviet Union. Generally, employees of a local contractor do the bulk of the installation work, but their work is overseen by Rockwell's own press erectors and it is Rockwell's own erectors who level the presses and do the final check of the equipment. Although both Rockwell International's graphic systems division and Lodge No. 126 are based in the Chicago area, because the press erectors are constantly being sent to different locations to install presses, it matters little where they permanently reside. As a result, most of the company's press erectors have established their permanent residences away from Chicago. Indeed, of the seventy-five press erectors who work for Rockwell International only about twenty reside in the Chicago area.

10. Press erectors belonging to Lodge No. 126 and employed by Rockwell International have on a number of occasions worked on the installation of large presses in the Province of Ontario. At the time of the making of this application, all the press erectors working in Ontario were American citizens. However, five of the press erectors employed by Rockwell International are Canadian citizens, and, like all of the company's press erectors, they are members of Lodge No. 126. Three of these Canadian citizens have their permanent residences in Ontario, one resides in Manitoba, and the remaining one resides permanently in the United States. At the time of the hearing, two of the Canadian residents were engaged in erection work for Rockwell International in the United States (one in Alabama, the other in California), one was doing similar work for the company in Finland, and the other was employed by the company in New Zealand.

11. As already indicated, only some twenty of the press erectors who work for Rockwell International live in the Chicago area, and at any point in time, many of the erectors will be working in various parts of the world. Lodge No. 126 has sought to tailor its operations to take into account the geographic spread of its membership. Although all meetings of the Lodge are held in the Chicago area, persons outside of the area can vote in elections for Lodge officers by way of mail-in ballots. All communications with the Lodge membership with respect to negotiations covering press erectors is done by mail, and when a tentative agreement has been reached with Rockwell International a mail-in ratification vote is conducted amongst the erectors.

12. The current collective agreement between Rockwell International and Lodge No. 126 contains no geographic limitation. The recognition clause reads as follows:

The company agrees to recognize the Progressive Lodge No. 126, International Association of Machinists and Aerospace Workers as the

sole exclusive bargaining representative of all machinists, erectors and press erectors engaged in assembling, erecting and dismantling, repairing and maintenance of printing presses and auxillary printing equipment outside of the plant premises.

There are at least two provisions in the collective agreement which clearly indicate that the agreement is meant to apply outside of the United States. Article VI stipulates that the pay of leadman installers is to vary, depending on whether or not they are working on the North American continent. Article XVIII of the agreement provides as follows for home visits by employees working away from home for long period of time:

The Company will pay the transportation costs (round trip) to an employee's home once every three (3) months for those employees who are away from home for long period of time. All trips home shall be arranged by the Company to the convenience of the job. This clause applies only to those erectors employed within the continental limits of the United States and Canada.

13. The evidence before the Board indicates that the terms of the collective agreement have in fact been applied to the press erectors of Rockwell International wherever they have been employed throughout the world. In particular, the evidence indicates the collective agreement has been applied to press erectors employed by Rockwell International when they have been employed in the Province of Ontario.

14. In seeking to determine the status of Lodge No. 126 and of its agreement with Rockwell International in the Province of Ontario, it goes without saying that the only applicable law is the law of Ontario. If Lodge No. 126 has the status of a trade union in Ontario it must be because it meets the definition of a trade union set out in section 1(1)(n) of the Ontario Act. Similarly, if the agreement is to be regarded as a valid collective agreement in Ontario, it must be because it meets the definition of a collective agreement set out in section 1(1)(e) of the Act.

15. Section 1(1)(n) of the Act defines a trade union in the following terms:

1.-(1) In this Act,

...

(n) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and designated or certified employee bargaining agency.

16. Having reviewed the constitution of the I.A.M., the by-laws of Lodge No. 126 and the viva voce testimony given concerning how the Lodge functions, we are satisfied that the Lodge is a viable organization of employees based in Bellwood, Illinois which has been established to regulate relations between employees and employers. If the Lodge's headquarters were in Ontario there would be no question but that the Lodge meets the requirements of a trade union set out in section 1(1)(n).

17. It was strenuously contended by counsel for the applicant that Lodge No. 126 cannot be a trade union under the Act because it lacks any permanent presence in Ontario. It is undisputed that while a small number of the Lodge's membership permanently reside in Ontario, and while members from time to time work in Ontario in the installation of presses, the Lodge has no permanent officials or offices in the Province. In support of its contention that Lodge No. 126 lacks the status of a trade union in Ontario, the applicant relied on the 1952 decision of the Board in the *A. H. Boulton* case, 52 CLLC ¶17,035, in which the Board dismissed an application for certification of a union local situated in Detroit, Michigan even though the local had an office in Ontario and employed organizers in the Province. In that case the Board concluded that the local did not subsist in any true sense within the Province and on this basis concluded that it did not have the status of a trade union in Ontario. The decision in the *Boulton* case was considered recently by the Board in *La-Z-Boy Canada Limited*, [1981] OLRB Rep. April 460. In that case the Board declined to follow the reasoning of the *Boulton* case on the basis that when the Board determines whether or not an organization has the status of a trade union, the Board must look to see whether or not it fits the definition of a trade union set out in the Act, not whether the organization has established a presence in Ontario. In reaching this determination the Board stated as follows:

It is firmly established that the Board can certify an international union which has its head office outside of Ontario (see *Ford Motor Co. of Canada Ltd.*, 46 CLLC ¶16,401, and *Metal Textile Corporation of Canada Limited* [55 CLLC ¶18,016]). Indeed, section 1(1)(n) specifies that " 'trade union' ... includes a provincial, national or international trade union ... ". There is nothing in the Act which either expressly or implicitly requires an international trade union to have a permanent office in Ontario or to have officers or representatives based in Ontario. Section 77(1) of the Act merely requires every trade union with members in Ontario to file with the Board a notice in the prescribed form giving the name and address of a person resident in Ontario who is authorized by the trade union to accept on its behalf service of process and notices under the Act. Far from requiring a substantial "presence" in Ontario, that provision amounts to a legislative recognition of the fact that the representatives of an international trade union may well be based in another jurisdiction where it might be difficult to effect service of process and notices under the Act. Accordingly, in view of the *CSAO National* case, the provisions of section 1(1)(n) and the other provisions of the Act, the Board is not entitled to consider whether an entity which claims to have status as a trade union has established a "presence" in Ontario or "subsists in any true sense within the province"; the Board can only determine whether or not the applicant is a trade union as defined by the Act. Therefore, we agree with counsel for the applicant that the *Boulton* case cannot be considered to be authoritative with regard to the issue of trade union status.

18. We agree with the basic reasoning of the Board in the *La-Z-Boy Canada Limited* case. A union local is not deprived of the status of as trade union in Ontario simply because it is headquartered outside of the province. However, the Board in determining whether an organization is "an organization of employees formed for purposes that include the regulation of relations between employees and employers" must be satisfied that the organization is a

viable organization capable of performing the functions of a trade union under the Act. See: *University of Ottawa*, [1981] OLRB Rep. Feb. 232. In our view, for an organization to be a trade union for the purposes of the Act, it must be capable of carrying out the functions of a trade union in Ontario. On the evidence before us, we are satisfied that although Lodge No. 126 has its headquarters in Bellwood, Illinois, the Lodge has structured its affairs so as to allow it to carry out the function of a trade union in Ontario. Members of the Lodge employed in Ontario can participate in local elections and vote in ratification votes by way of mail-in ballots. The local has negotiated a collective agreement which covers Ontario, and its members have on a number of occasions been employed in Ontario pursuant to the terms of the collective agreement. There was no evidence led as to any situation where members of the lodge working in Ontario became involved in situations requiring the local's active assistance. However, from the evidence led at the hearing concerning the union's assistance to its members at other locations outside the United States, we have no doubts as to the Lodge's capacity to assist its members when working in Ontario. If required, the Lodge can call upon the assistance of international representatives of the I.A.M. based in Ontario. Indeed, at the hearing in this matter, Lodge No. 126 was represented by both Mr. R. Hayes, the secretary-treasurer of the Lodge, as well as by Mr. A. Walker, an international representative of the union who works out of Toronto. In all these circumstances then, we are satisfied that Lodge No. 126 is a trade union within the meaning of section 1(1)(n) of the Act.

19. In opposing granting status to Lodge No. 126, the applicant noted that in Article I, section 2 of the by-laws of the Lodge, the jurisdiction of the Lodge is set out as follows:

The jurisdiction territory of Progressive Lodge No. 126 shall be the territory lying within the city of Chicago and Fifty (50) miles of the city limits, in accordance with our agreement with the Contractors Association.

The reference to an agreement with a Contractors' Association is to an Association which does not include Rockwell International and which does not concern itself with press erectors. We are not prepared on the basis of this Article to decline to find that the Lodge is a trade union under the Act. For one thing, Article IV, Section 25 of the by-laws addresses itself to the situations where Lodge members work outside of the stated jurisdiction of the Lodge. Further, the evidence is clear that for at least thirty-four years press erectors belonging to the Lodge have worked outside the Chicago area and have still been represented by the Lodge.

20. We turn now to consider whether the agreement between Rockwell International and Lodge No. 126 is a collective agreement under section 1(1)(e) of the Act which defines a collective agreement as follows:

1.-(1) In this Act,

...

(e) "collective agreement" means an agreement in writing between an employer and an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand,

containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement.

We are satisfied that the document in question is an agreement in writing between an employer, Rockwell International, and a trade union, Lodge No. 126, that represents employees of the employer, and that it contains provisions respecting terms or conditions of employment as well as of the rights, privileges and duties of the employer and of the trade union. Further, the document contains those provisions required of a collective agreement under the Act, namely, a prohibition against strikes and lock-outs during the term of the agreement, as well as a provision for the settlement of arbitration of any disputes arising during the term of the agreement. In addition, the agreement is for a term certain in excess of one year. Accordingly, we are satisfied the document fits all the statutory requirements of a collective agreement under the Act.

21. In most circumstances we would not be prepared to conclude that a seemingly open-ended recognition clause in a collective agreement signed with a trade union based outside of Ontario does in fact cover Ontario. However, in the instant case, on the basis of both the contents of the agreement itself and the viva voce evidence as to how it has been interpreted and applied over the years, we are satisfied that the scope of the collective agreement does in fact encompass the Province of Ontario. We are well aware of the potential for abuse if trade union locals based outside the province are free to sign valid collective agreements which encompass Ontario within their scope clause. However, we believe that the Act is capable for ensuring that such abuses do not occur. In this regard we would note in particular section 40 of the Act which provides that an agreement shall be deemed not to be a collective agreement if the employer has contributed improper support to the union, as well as section 52 which sets out a mechanism by which employees can challenge the validity of a collective agreement entered into by a trade union that has not been certified. In the instant case however, there has been no abuse and no improper employer support of Lodge No. 126. The current collective agreement was signed against the backdrop of a history of Rockwell International employing individuals in Ontario who were members of Lodge No. 126. In these circumstances, we are satisfied that the agreement is in fact a valid collective agreement.

22. We would note that although the collective agreement purports to be multi-national in scope, to the extent that it applies in Ontario, it is affected by the provisions of *The Labour Relations Act* and in that respect must be viewed as being in the nature of a province wide agreement. Thus, for example, during the "open period" of the last two months of the collective agreement, it would be open for another trade union to seek to displace Lodge No. 126 as the bargaining agent of press erectors employed by Rockwell International in Ontario, or for the employees themselves to apply to terminate the union's bargaining rights. If successful, then pursuant to either section 48(1) or section 49(6) of the Act, the collective agreement would no longer have any force or effect in Ontario.

23. Having regard to our determination that there is a subsisting collective agreement covering the persons sought to be represented by the applicant and to the fact that this application was not made during any of the "open periods" provided for in section 5 of the Act, the application is hereby dismissed as being untimely.

DECISION OF BOARD MEMBER C.A. BALLENTINE;

1. This application for certification was filed pursuant to the construction industry provisions of *The Labour Relations Act*. The applicant is seeking to be certified to represent a unit of millwrights and millwrights' apprentices in the employ of Rockwell International in the province of Ontario, pursuant to section 131a of the Act.
2. A purported collective agreement between the respondent and intervener #2, Lodge #126 of the International Association of Machinists and Aerospace Workers (I.A. of M.) was raised as a bar to the application. I note that Lodge #126 is based in Bellwood, Illinois, a suburb of Chicago, U.S.A. with a constitution providing that it has a territorial jurisdiction limited to the City of Chicago and 50 miles from the Chicago city limits. The applicant seeking certification from the Ontario Labour Relations Board is comprised of local unions both situated and having jurisdiction in Ontario. The Board heard evidence concerning the jurisdiction and practice of Lodge #126. As the majority notes, Lodge #126 is one of the International Association of Machinists's construction lodges and members of that lodge are engaged in work which would come within the construction industry. Lodge #126 is affiliated with the Chicago and Cook County Building and Construction Trades Council. However, it is this union which is seeking to establish that it has bargaining rights in Ontario to prevent the applicant, a Council of Ontario based unions, from obtaining a certificate.
3. The definition of a trade union contained in section 106(f) of the Act provides that a trade union in the construction industry must be a union that according to established trade union practice pertains to the construction industry. Neither Lodge #126 nor the International Association of Machinists have status as a construction industry trade union in the province of Ontario.
4. The majority rely on the *La-Z-Boy Canada Limited* case to justify its position that Lodge #126 is a viable entity in Ontario. The main difference between this case and *La-Z-Boy* is that the instant case falls within the construction industry provisions of the Act, *La-Z-Boy* does not. In *La-Z-Boy*, the international union, "the United Furniture Workers of America, A.F.L.-C.I.O." applied for certification of *La-A-Boy* employees. Since it had not established status as a trade union in Ontario, it had to prove status as a trade union. On the other hand the I.A. of M. and its lodges in Ontario have been long established trade unions in Ontario, but not in the construction industry. Lodge #126 may be an established trade union in the state of Illinois and has an established trade union practice pertaining to the construction industry in the United States, but not in Ontario.
5. In my opinion, neither Lodge #126 nor the I.A. of M. is a viable trade union in the construction industry of Ontario. Mr. R. Hayes, the secretary-treasurer of Lodge #126, when questioned, admitted that he was not familiar with the labour laws of Ontario, including *The Occupational Health and Safety Act* provisions pertaining to the construction industry. Mr. A. Walker, the international representative in Canada, admitted that the I.A. of M. did not have a presence in the construction industry in Ontario. This raises the question in my mind as to how can they properly represent employees in the construction industry of Ontario in accordance with the trade union's responsibility under section 60 of *The Labour Relations Act*, when the union is both unfamiliar with the construction industry of Ontario, and in particular, unfamiliar with the relevant portions of the safety regulations dealing with the construction industry.

6. It is not much consolation for the majority of the Board to inform the applicant and the employees seeking representation by the applicant that they may apply to the Board during the open period under the collective agreement. The evidence before the Board indicated that the respondent enters and leaves Ontario periodically and is not always present in Ontario. For this reason, the applicant would have to be lucky and apply for certification when the company was engaged in operations in Ontario during the two month open period.

7. In my view, the majority's decision does not recognize the realities of the Construction Industry in Ontario because it permits an agreement negotiated outside of Ontario, indeed outside of Canada, between a trade union which is not a trade union within the meaning of the construction industry provisions of the Act to be raised as a bar to an application for certification by an affiliated bargaining agent under the laws of Ontario.

8. In conclusion, I am of the opinion that Lodge #126, is not a trade union within the meaning of the construction industry provisions of the Act. Furthermore, the collective agreement between Lodge #126 and the company was negotiated in a foreign country and ought not to be placed as a bar to an application for certification made by a recognized construction industry trade union in the province of Ontario. For these reasons, I would find that the application is timely.

0084-81-M Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union Of North America, Local 1089, Applicant, v. **Teperman and Sons Limited**, Respondent.

Practice and Procedure-Section 112a-Respondent requesting Board to determine whether work in ICI sector-Board interpreting section 135

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and H. Kobryn.

APPEARANCES: *S. B. D. Wahl, T. Neil and R. D'Andrea for the applicants; John Sanderson, Q.C. R. M. Parry and D. Nisker for the respondent.*

DECISION OF THE BOARD; June 30, 1981

1. The applicants have referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.

2. At the commencement of the hearing, the respondent requested the Board to make a formal determination under the provisions of section 135 of *The Labour Relations Act* as to whether the work which forms the subject matter of this referral is within the industrial, commercial and institutional sector of the construction industry. This request was opposed by the applicants.

3. The facts before the Board are not in dispute. The work which forms the subject matter of this reference was performed by the respondent in Sarnia and consisted of the demolition of unit #3 at the Imperial Oil-Esso Chemical Refinery. This work has now been completed and in its place a construction project is in progress which consists of work which is within the industrial, commercial and institutional sector of the construction industry.

4. The work which forms the subject matter of this reference was performed entirely by the respondent using labourers who are members of Locals 1089 and 506 of the Labourers' International Union of North America. The respondent is a member of the Metropolitan Toronto Housewreckers Association (the "Association"). In 1972 a collective agreement was entered into between the Association on behalf of its signatory members (including the respondent) and Local 506. This collective agreement, which covered "all wrecking labourers employed in geographic area #8", has been renewed from time to time and a collective agreement is in effect at the present time. The demolition work in Sarnia (which is in the County of Lambton — geographic area #2) was performed under the terms and conditions of this collective agreement. There is no dispute between the parties that in the context of this referral there is no distinction between the words "demolition" and "wrecking".

5. The respondent argues that the Board should embark on an inquiry and make a determination pursuant to section 135 and that once the Board has made such a determination, the Board should then address itself to the merits of this reference under section 112a between the parties hereto. The respondent has adopted the position that the importance of the issue in this referral merits a determination pursuant to section 135 and that this in turn would permit a wider representation to the Board in accordance with the principles set forth in *Harbridge & Cross Ltd.*, [1979] OLRB Rep. April 33. Specifically, the respondent takes the position that the Association, its members and Local 506 ought to be, and would be, parties in a proceeding and determination under section 135.

6. The applicants opposed the request for a determination under section 135 on three grounds. The applicants were critical that the notice of such a request was received only at the hearing. The applicant also urged on the Board an interpretation of section 135 whereby its provisions could only be invoked by a party which asserted that work performed or to be performed is within the industrial, commercial and institutional sector of the construction industry and not by a party such as the respondent which has asserted that work performed or to be performed is not within the industrial, commercial and institutional sector of the construction industry. The applicants further relied on the fact that even under the principles set forth in *Harbridge & Cross Ltd.*, *supra*, the parties to the referral, together with the Provincial Employer Bargaining Agency — Labourers (which has received notice of this referral), are the only persons who would be entitled to participate in an inquiry and determination under section 135. The applicants argued that Local 506 would not be entitled to notice and to participate with respect to an inquiry and determination under section 135 and that, since the Association and its members (other than the respondent) had not performed the work in dispute, the Association and its members (other than the respondent) would not be entitled to notice and to participate with respect to an inquiry and determination under section 135.

7. The Board recognizes the importance of issues before it in this referral. The principles set forth in *Harbridge & Cross Ltd.*, *supra*, were designed to permit a method of determining which persons had standing to participate in a proceeding under section 135. At page 314 the Board stated in paragraph 9 as follows:

In our view, in order for a person to have standing to participate in a proceeding under section 135 such a person is required to have direct connection with the project wherein the question arises or will arise. A direct connection is possessed by a person who employs employees who are working or who will work on the project; trade unions or councils of trade unions which have bargaining rights for employees who are working or who will work on the project; and employer bargaining agencies, employee bargaining agencies and affiliated bargaining agents which represent the employers, trade unions or employees previously referred to in this paragraph.

In applying these principles, the Board is not prepared to find that either Local 506 or the Association and its members (other than the respondent) have standing to participate in any inquiry and determination pursuant to section 135.

8. The Board rejects the first ground advanced by the applicants. While it is incumbent on a party which raises an issue with respect to section 135 to inform the Board and the other parties of its position in a manner that does not cause delay and embarrassment, the Board notes that the parties in this proceeding have been endeavouring to resolve their differences privately and that such endeavours have ultimately proved to be unsuccessful only shortly before the hearing. With respect to the second ground, the Board does not interpret section 135 in the same restricted manner as that proposed by the applicants. Section 135 is to be interpreted so as to permit the Board to decide whether given work is or is not within the industrial, commercial and institutional sector of the construction industry. The Board agrees with the third ground raised by the applicants with respect to the interpretation and application of the principles set forth in *Harbridge & Cross Ltd., supra*, to the circumstances of this referral.

9. The Board finds that it would serve no useful purpose to enter upon an inquiry and make a determination pursuant to section 135 because all of the parties who would be entitled to notice in a proceeding under section 135 are before the Board in this referral under section 112a. The Board further finds that the parties to this referral, together with the Provincial Employer Bargaining Agency — Labourers (which has received notice of this referral), are the appropriate parties to this referral under section 112a. The Board notes that the Provincial Employee Bargaining Agency is one of the applicants in this referral. The issue before the Board with respect to the interpretation and application of the provincial collective agreement covering labourers in the industrial, commercial and institutional sector of the construction industry may be fully presented by the parties to this referral. The Board notes that it is open to the respondent to consult with the Association and its members and to call such evidence as the respondent chooses to call in order to have this important issue fully investigated before the Board.

10. The Registrar is directed to list this matter for continuation of hearing.

0422-81-R United Food and Commercial Workers International Union, Local 175, Applicant, v. Thorold IGA Market, Respondent, v. Group of Employees, Objectors.

Certification-Petition-Petitioner re-affirming support for union by signing counter-petition-Standard form counter-petition provided by union organizer-Whether Board going behind face of document-Whether counter-petition voluntary

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Douglas J. Wray and Frank G. Kelly for the applicant; R. A. Werry and J. Pachereva for the respondent; Tony Tirabassi for the objectors.*

DECISION OF THE BOARD; June 23, 1981

1. The name of the respondent is amended to read: "Thorold IGA Market".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in The Municipality of Thorold, Ontario, save and except manager, persons above the rank of manager, meat department employees, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The applicant filed membership evidence on behalf of 9 of the 14 employees in the bargaining unit on the date of making the application. There was also a timely statement filed in opposition to this application, and that statement was signed by two of the employees who signed cards in the applicant. If voluntary, the petition would therefore reduce the applicant's unequivocal membership position below 55%, and normally cause the Board to direct the taking of a representation vote. There was, however, a statement subsequently filed by one of the two relevant signatories to the petition, revoking his signature on the petition and reaffirming his desire to be represented by the applicant. The statement was in the following form:

To: The Ontario Labour Relations Board

Re: Local 175, United Food & Commercial Workers International Union, AFL-CIO-CLC, and

Thorold I.G.A.

I, (Deleted), hereby state that I am a member of Local Union 175, United Food & Commercial Workers International

Union. I joined this union on May 25th . I signed and paid one dollar initiation fee.

On June 3rd I signed a petition against the union's application for certification. I did so because I thought my job was in jeopardy. I still wish to be a member of Local Union 175, and I wish to be represented by this union in collective bargaining with my employer, Thorold I.G.A.

Please disregard my signature on the petition filed in opposition to the union's application.

I hereby designate Frank Kelly to appear before the Board on my behalf at the hearing in this matter.

June 3rd
(Date)

(Deleted)
(Signature)
(Deleted)
(Address)

Witness: _____

If such statements of revocation are found to be voluntary, the Board's practice is to discount the prior act of signing a petition in opposition to the union. In the present case, the Board indicated that if the single statement of revocation were voluntary, the remaining overlapping signature on the petition would no longer be material, as it could not in any event reduce the applicant's unequivocal membership position below 55%: the applicant would still represent 8 of the 14 employees in the unit.

6. The Board accordingly directed that it would first inquire into the voluntariness of the statement of revocation and reaffirmation. The evidence in that regard was given by Frank Kelly, an organizer with the applicant who has been employed in that position for a period of three years. Mr. Kelly was responsible for signing up employees in the present campaign, and received word after the application went in that a petition had been circulated against the applicant. Mr. Kelly attended at the home of the employee here in question a few days later and, after bringing up the petition, asked him why he had signed it. The employee answered "that he had given the thing some thought, that a guy's got to look after himself, and that he relies on his job". The employee also added: "Why pay union dues?" Mr. Kelly reminded him that the night the employees had signed cards, he had been a bit of a leader by being first, and asked him to fulfill the commitment he had made that night. The employee went on to mention that there was no opportunity for him to become a department head in another store that the owner was going to buy, and added that he had been under tremendous pressure at the store. The employee's father was present and said that his son should do what he feels is right. The employee then read over the letter of revocation which Mr. Kelly presented to him, and signed it.

7. Mr. Kelly conceded that the letter of revocation placed before the employee in question was a standard form that Mr. Kelly carried in his briefcase. He conceded that he had had no prior discussion with the employee before showing him the letter, and no specific

discussion of him losing his job prior to signing. From this the respondent argues that the document is untrue on its face, and that the whole document ought therefore to be disregarded.

8. This is not the first time a letter of revocation has been received by the Board in this form, although there does not appear to have been any prior challenge to its use. The document is typed with blanks to be filled in for the specific occasion, and there clearly is no attempt on the part of the applicant to mislead the Board into thinking it is receiving anything but a standard form document. Nevertheless, the Board has some concern over a standard form which purports to ascribe a particular motivation to an employee, particularly in terms as colourable as: "I did so because I thought my job was in jeopardy". The Board noted at the hearing that there might well be circumstances in which the practice of an applicant appearing in effect to put words in an employee's mouth might weigh against the applicant on evidentiary matters which are in dispute.

9. The issue before the Board here is the voluntariness of the act of revoking the employee's prior signature on the petition. Having regard to Rule 48 of the regulations and considerations of confidentiality, the Board's normal practice, in these matters, be it regarding original evidence of membership, evidence in opposition (petitions), or evidence of reaffirmation, is to accept written evidence which meets its criteria, and not to examine behind the face of that written evidence. The written evidence, in other words, must speak for itself (see, e.g., *PRC Chemicals*, [1980] OLRB Rep. May 749). Counsel for the respondent argues, however, that the Board must and does go behind the document where the statement on its face has been shown to be untrue. Such is not the case here, however. The most that can be said is that the evidence demonstrates that Mr. Kelly, at the time he initially presented the letter to the employee, did not know whether the statements contained therein were true or not. It remained for the employee to read the letter and decide whether he agreed with its contents or not. While the employee's motivation is not in issue here, the Board notes that it was open to the employee, if he disagreed with the statement concerning the petition and his job, to strike that statement out, or refuse to sign it at all. Given the opportunity to read the document, however, in circumstances not otherwise impairing the employee's freedom of choice, the Board takes an employee who subsequently signs the document to agree with its contents. There is no evidence to indicate that the statement, although prepared in advance, was not, as it turned out, true, in the case of this particular employee who signed. The Board accordingly finds no basis for refusing to take the letter at face value, insofar as a simple reaffirmation is concerned, and, as stated at the hearing, discounts as a result that employee's signature on the petition.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on June 4, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

0493-81-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Applicant, v. **Tri Canada Inc.**, Respondent, v. Tri-Canada Employees' Association, Intervener.

Certification-Pre-Hearing Vote-Applicant seeking pre-hearing vote-Intervener seeking certification by intervention-Intervener requesting delay of vote until its trade union status determined-Board distinguishing *Emery Industries* case

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

DECISION OF THE BOARD; June 9, 1981

1. In this application for certification, the applicant is requesting that a pre-hearing representation vote be held. The intervener has filed an Application for Certification By Intervener (R.R.O. 1970, Reg. 551, Form 12) and does not request that a pre-hearing representation vote be held.

2. The intervener has not previously established in any proceedings before the Board that it is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*. Consequently, the applicant has asked the Board to defer directing the pre-hearing vote which the applicant is seeking until the Board has determined whether the intervener is a trade union within the meaning of the Act. The intervener submits that the Board should proceed with the vote and place the issue of its status before a hearing of the Board in due course.

3. Section 8 of the Act provides a prompt means for an applicant to have its request to represent employees tested by way of the pre-hearing representation vote. Under this section the Board has the discretion to decide whether to direct that a vote be held. Where the statutory prerequisites of the section are met, the Board will usually direct a vote. In order to avoid prejudicing the applicant by delaying the vote, if there are outstanding issues at the time of the vote, the Board will put these on for hearing after the vote. (For a detailed discussion of the purpose of the section within the scheme of the Act, see *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316). In that case the incumbent trade union intervened in the application and disputed the Board's jurisdiction to direct a pre-hearing representation vote before it had made an affirmative finding that the applicant was a trade union within the meaning of the Act. The Board directed the vote and scheduled a hearing into the issue of the applicant's trade union status. In doing so, it was complying with the applicant's request and was satisfying the purpose of section 8. The case at hand is readily distinguishable from that case in that it is the intervener which has not established that it is a trade union within the meaning of the Act and it is the applicant which is requesting deferral of the vote until the intervener's status is decided. In effect, the applicant is consenting to a delay in having the representation question tested by a vote in a proceeding which it initiated. The Board dealt with similar circumstances in *Brown Shoe Co.*, [1965] OLRB Rep. Dec. 584 and, at the applicant's request, decided the status issue. Therefore, the Board will grant the applicant's request and it will defer directing the vote until the Board has determined whether the intervener is a trade union within the meaning of the Act.

4. The Registrar is instructed, therefore, to list this matter for hearing at the earliest

possible date to allow the intervener the opportunity to establish its status as a trade union and to hear the evidence and submissions of the parties on that issue.

DECISION OF BOARD MEMBER O. HODGES;

1. In the circumstances of this case and considering the representations of the applicant, I concur with the majority decision to defer directing the pre-hearing vote until the Board has determined whether the intervener is a trade union within the meaning of the Act.

2. With regard to *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316, cited in this matter, I view with approval the dissenting decision of Board Member D. B. Archer in *Ontario Hospital Association (Blue Cross)* [1981] OLRB Rep. April 468, wherein he said in part:

“3. I also wish to disassociate myself from the majority’s endorsement of the *Emery Industries Limited* principle, which is to the effect that a pre-hearing vote may be directed by the Board prior to the proof of trade union status by an applicant.

4. I disagree with the reasoning in the passage quoted from the *Emery Industries Limited* decision at para 29 of the majority decision, where it states that “there is no reason for according the ‘status issue’ a special significance which removes it from the ambit of a legislative scheme which specifically provides for a resolution of disputed issues after a vote is taken.”

5. There is no question that section 8 of the Act contemplates that the resolution of issues be postponed until after the vote is held. However, in my view, the status of the applicant is so fundamental that that is not one of the issues that may be postponed under the scheme set out in section 8. Section 8(1) states that “a trade union may request a pre-hearing representation vote be taken.” It is clear that before the Board has jurisdiction to direct a vote under section 8(2), it must be satisfied that the applicant requesting it indeed is a trade union within the meaning of the Act.

6. Besides, it concerns me that the Board is directing employees to vote for or against an entity, which may or may not be in existence. When employees cast their ballots, they will not have any assurance that the applicant is not employer dominated or engaged in discrimination practices. They will not know whether the applicant has a constitution or whether it has elected officials. On the other hand, there is always the possibility that, from the mere fact that a vote has been directed, employees may assume that the Labour Board has already recognized the applicant as a legitimate trade union.

7. I am of the view that the *Emery Industries Limited* case is wrongly decided. I would have required the applicant to prove status, prior to being entitled to any representation vote. In order not to deny new trade unions access to pre-hearing votes, the Board should devise a method of

conducting a quick hearing to dispose of trade union status issues in these circumstances.

3. Absent a collective bargaining agreement or what may purport to be a collective bargaining agreement between the intervener and the respondent, I would not entertain the application of the intervener. I would instead proceed with the application for certification by way of the pre-hearing representation vote, with the ballot offering employees a choice between the applicant or no union.

2529-80-R Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **United Shelters Ltd.**, c.o.b. as Lisgar Construction Co., Known Construction Company Limited and 281981 Ontario Limited, c.o.b. as Sola Developments Co., Respondent.

Related Employer-Whether related activities under common direction or control-Whether union delay causing Board not to exercise discretion

BEFORE: R. D. Howe, Vice-Chairman, and Board Members E. C. Went and C. A. Ballentine.

APPEARANCES: *J. James Nyman, Quintin Begg and Michael Lloyd for the applicant; R. M. McLean for the respondent United Shelters Ltd., D. A. Peroff for the respondent Known Construction Company Limited, and Gino B. Bifulchi for the respondent 281981 Ontario Limited.*

DECISION OF THE BOARD; June 22, 1981

1. This is an application under section 1(4) of *The Labour Relations Act* in which the applicant seeks a declaration that associated or related activities or businesses are carried on under common direction or control by the respondents, and a declaration that the respondents are bound by the collective agreement between the Carpenters' Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America. The applicant has alleged in the alternative that a sale of business has taken place within the meaning of section 55 of the Act. However, during argument counsel for the applicant stated that he did not intend to make any submissions with respect to that alternative allegation since there was no evidence before the Board of any such transaction.

.....

3. Pat Bifulchi ("Pat") came to Canada from Italy in 1949 and was employed as a carpenter for several years. In 1955 he embarked upon his first business venture by forming a partnership with an older gentleman to carry on business as Lisgar Construction, which "did mainly carpentry work". When his partner retired in 1958, Pat formed a new partnership under the same name with his brother, Gino Bifulchi ("Gino"), a cement finisher. With Gino's

assistance, the business expanded beyond carpentry work into “the concrete business”. Pat managed and promoted the business while Gino went to the job sites and worked as a cement finisher. After approximately seven months, the partnership dissolved “at the end of 1958 or the beginning of 1959” because Gino was dissatisfied with his share of the profits, because the brothers had irreconcilable differences of opinion concerning taking on new work, and because “Gino couldn’t help [Pat] with carpentry work and [Pat] couldn’t help him (Gino) with cement work”. The business continued under Pat’s direction with contracts for construction work in Metropolitan Toronto and other parts of Ontario.

4. On July 4, 1960, Pat signed on behalf of Lisgar Construction Company a “Working Agreement” with The Building and Construction Trades Council of Toronto and Vicinity (the “Council”) by which the Company recognized the Council and its affiliated unions as the collective bargaining agent for all its employees and agreed to be bound by the contracts existing between each of the unions affiliated with the Council and the Toronto Builders’ Exchange. The company subsequently became a member of the General Contractors Section of the Toronto Construction Association.

5. In 1961 Pat caused a company to be incorporated under the name United Shelters Limited, which carried on business as Lisgar Construction Company. That company (hereinafter referred to as “Lisgar”) operated as a general contractor in the industrial, commercial and institutional (“ICI”) sector of the construction industry. Lisgar’s president and sole shareholder is Pat, who is also one of its two directors. The other director is Pat’s son, Gino B. Bifulchi (“Gino B.”) who has authority to sign cheques on behalf of the company and provides a variety of services to the company as detailed below. When Lisgar was originally incorporated, its directors included Gino and his wife (Renata).

6. After the partnership between Pat and Gino dissolved, the latter was employed by various other contractors and “worked on a few little jobs [of his own] part-time” until he started his own (unincorporated) business in Bolton, Ontario, in 1965 under the name, Known Construction. In 1969, Known Construction Company Limited (“Known”) was incorporated. Gino is Known’s president, sole director and sole shareholder. Linda Gray, who is the secretary-treasurer of Lisgar, was also listed as an officer of Known on its last corporate return.

7. In the early 1970’s, Pat moved Lisgar from Toronto to a building in an industrial park in Bolton. When Gino, who had been operating from an office in the basement of his home in Bolton, learned that Lisgar had surplus office space in Bolton, he caused Known to enter into a cost sharing arrangement with Lisgar with respect to office space, secretarial services and various other expenses.

8. In 1974, after studying at a community college construction related topics including drafting, surveying and estimating, Gino B. caused to be incorporated 281981 Ontario Limited, which carried on business at all material times as Sola Developments Company (“Sola”). Under Gino B.’s direction as president, Sola borrowed money from a bank to purchase some land and, with money derived from a mortgage co-signed by Pat, built several custom homes. Sola also provided various services including drafting, estimating and site supervision to Lisgar and Known. Sola charged for those services on the basis of an agreed upon hourly rate. Gino’s son Julio was hired by Sola in 1976. He continued to be an employee and minor shareholder of Sola until he incorporated his own company, Scave Investments

Limited, in 1979 or 1980. With the profits derived from the sale of the custom homes and further funds which it borrowed from a bank, Sola purchased from "Calbion", a company owned by Gino B.'s mother and his aunt, a property in Bolton on the west side of Highway 50 on which it, as a general contractor, constructed an office building. Construction of that building commenced in the summer of 1977. Gino B. did some of the work on the building himself with the assistance of "a few friends" who helped him on weekends. Sola subcontracted the remainder of the work to Lisgar, Known and other companies. Lisgar carried out site work, excavation, backfill, grading, graveling, concrete work and carpentry work, for which it invoiced Sola a total of \$61,800.00. Although the work was completed by March of 1978, no invoice was sent to Sola until December 29, 1978, when Lisgar requested a "progress" payment of \$15,000. This invoice was paid by cheque dated March 1, 1979. Further invoices were sent on July 3, 1979 and February 1, 1980 for \$30,800 and \$16,000 respectively, but were not paid until October of 1980. Gino B. advised the Board that the abnormal delay in invoicing and payment of those sums resulted from the fact that his father "was giving [him] a bit of a break" because he (Gino B.) was "in a tight spot" and was "strapped". Gino B.'s uncle adopted a similar beneficent approach; the 100 hours of carpentry work and 245 hours of labourers' work completed in March of 1978 were not invoiced by Known until September of 1978. That invoice (which totalled \$6,038) was paid by Sola in November of 1978.

9. After the building was completed, Sola leased part of it to some of Gino B.'s friends, who attempted to establish a welding business on the premises. Sola retained part of the remaining space for its own use and attempted (unsuccessfully) through advertising to lease the rest. The tenants took possession of the leased area for a few months but later vacated the premises due to the lack of success of their business venture. Meanwhile, the building in which Lisgar and Known had been operating was sold "rather unexpectedly" when an attractive offer to purchase presented itself. As a result, the respective principals of those companies decided to lease Sola's building. Accordingly, the parties executed a "lease agreement" on April 2, 1978 by which Lisgar and Known agreed to rent the entire premises, with the exception of a small area which Sola reserved for itself, for \$1,500 per month. Lisgar's share of the rent was \$1,000 per month (of which \$300 was invoiced to "Calbion", which rented one office in the building for storage of records and files). Sola invoiced Known for the remaining \$500 per month. Although Lisgar and Known took possession under the lease in April of 1978, Sola did not invoice them for any rent until November of 1980 when he invoiced each company for eight months rent. His explanation for that delay was that he was returning their favours (of not pressing for payment for the construction services which they had respectively provided to Sola) and that he was finishing the building during that period of time.

10. In February of 1980, Sola sold the building to one Peter Triantafilopoulos, who agreed to assume the existing lease arrangements. Prior to the sale, Lisgar agreed to revise its lease with Sola so as to increase the rent to \$2,500 per month to make the building more attractive to prospective purchasers and to reflect the fact that Sola would itself become responsible for payment of a portion of the rent upon the sale of the building. (Known's rent remained unchanged at \$500 per month). After the sale, Sola paid rent of \$300 a month to Lisgar for its (Sola's) area of the building.

11. Sola provides extensive drafting, quantity take-off, estimating, tender preparation, expediting, co-ordinating, inspection and site supervision services to Lisgar and Known. The terms of the arrangement which Sola has with Lisgar are as set forth in the following letter dated April 28, 1980 from Gino B., in his capacity as president of Sola, to Pat, in his capacity as president and general manager of Lisgar:

"As per your request and our recent discussion, we are pleased to confirm the following:

Our company would supply the service for, [sic] investigate, prepare and tender projects directed by you; co-ordinate and expedite same; negotiate and materialize final contract with owners and sub-contractors; prepare list of materials and supervise the project; for the rate of \$35.00 per hour, plus transportation expenses.

We thank-you for giving this opportunity to our company and we hope to be of service to you in the near future.

We shall be advising you in advance when the above quoted price will be subject to change."

Similarly, the terms of Sola's arrangement with Known are as set forth in the following letter dated March 23, 1980, from Gino B., in his capacity as president of Sola, to Gino, in his capacity as president of Known:

"The following will confirm our verbal discussion of today.

In reference with our company, supply our service in tendering projects, negotiate with owners and sub-contractors, to finalize binding contracts, to co-ordinate and expedite the work and to supervise the work. [sic]

Our fee will be \$35.00 per hour, plus transportation expenses.

We hope you find the above favourable and we can be of service to you in the near future.

We shall advise you in advance when the above quoted price will be subject to change.

We thank-you for your interest in our service."

Those documents superseded prior arrangements under which Sola had received \$30 per hour for its services. (Before that, the rate had been \$27 per hour). Although Gino B. testified that Sola provided similar services to other companies, the only documentation which he submitted in support of that assertion was an invoice dated March 1, 1976, in the amount of \$450.00 to an animal hospital in Etobicoke for "drafting service". He also stated that other "customers" did not generally pay him as much per hour as he received from Lisgar and Known.

12. Pat testified that he decided to "share space" with Known in Bolton in order to minimize expenses. Accordingly, telephone expenses (including the substantial cost of a direct line to Toronto), insurance premiums, utilities and some secretarial expenses are apportioned between the companies under a rather informal cost sharing arrangement by which Lisgar invoices Known for its share of such costs from time to time. Sola also used the same telephone lines and pays a "minimal fee" for their use and for telephone answering and bookkeeping

services. Lisgar, Known and Sola each use the same bank, solicitors, and accountants. They share the services of a bookkeeper. However, Known also employs part-time employees from time to time to perform bookkeeping and clerical work, and Gino B.'s fiancée provides some bookkeeping assistance to Sola. The respondents have a common address and common telephone numbers. The telephone is answered with reference to digits of the telephone number, and without reference to the names of any of the companies in the building. The caller is then referred to the appropriate individual. Lisgar and Known each employ their own secretaries. A secretary employed for Lisgar generally answers the telephone for all of the respondents, but when she is unable to do so, this task is performed by a secretary employed by Known. Lisgar, Known and Sola each have their own separate letterheads, financial records, bank accounts and payrolls. Each occupies a separate partitioned area of the building, although they share a common reception area and board room. Lisgar sometimes uses Known's employees to perform work on Lisgar sites. On such occasions, the employees continue to receive their wages from Known.

13. Lisgar and Known each have their own separate vehicles and equipment. Lisgar's vehicles and equipment are stored in a yard near its office, while Known's vehicles and equipment (which consists of small tools and drills) are stored in a separate location approximately one kilometer away. Lisgar sometimes provides a bulldozer and front end loader to Known (which has no heavy equipment) together with an operator (who continues to be paid by Lisgar), and subsequently bills Known for this service (at a rate of \$35 per hour). Gino advised the Board that when he "rents" such equipment from Lisgar, he puts a "Known" sticker on it "most of the time" but he also stated that "it depends who's driving and whether he remembers".

14. Pat testified that Known does work for Lisgar "occasionally — maybe four or five times in 1980". It was his evidence that the work which Lisgar subcontracts to Known is generally "concrete work". When asked the "dollar amount" of such work in 1980, he stated that he did not think it would be more than \$50,000.

15. Prior to 1980, Known operated primarily as a concrete specialty contractor and did all of its work in the Metropolitan Toronto area. However, in 1980 the company, in addition to doing "about \$50,000" worth of concrete work for Lisgar, began to operate as a general contractor on ICI jobs in other parts of the province. As a result, Known obtained general contracts for construction of a school and other buildings in locations such as White River, Marathon, Manitouwadge and South Narrows. Gino's only explanation for this striking change in Known's operations was as follows:

"If that's where the job takes you, that's where you go. Not very much work was available to me in Toronto. I wasn't hiding in Toronto very much. I felt I was wasting my time bidding in Toronto."

In response to a question by Board Member Ballentine, Gino stated: "I do my own superintendent work. I never hire a superintendent". However, that statement is contradicted by other evidence before the Board which clearly establishes that Known employed at least three superintendents during various intervals in 1980 and 1981 and, in addition, received invoices from Sola in 1980 for over \$50,000 for services which included site supervision.

16. In 1981 Known bid on at least ten ICI projects throughout Ontario, including a

sewage treatment plant in Cobourg, an area in which it had never previously worked. Its bid of \$1,800,000 was the lowest bid on the project and, accordingly, it was awarded the contract, which was subsequently rescinded when “the job didn’t go through”. Quintin Begg, a business agent for the applicant, became aware in January of 1981 that Known had bid on that project as a result of information which he read in the Daily Commercial News concerning bidders on that project. Mr. Begg advised the Board that he is responsible for monitoring construction projects within his jurisdiction, which consists of Board Areas 9, 10, 11 and 12, to determine whether they are being completed by companies which have collective agreements with the applicant. One of the ways in which he performs that function is by monitoring the Daily Commercial News, a construction newspaper which contains information (such as preliminary planning notification and lists of bidders) concerning construction projects. Since Mr. Begg had never before encountered Known, he conducted certain inquiries and subsequently instructed the applicant’s solicitors to arrange for a corporate search. The present application was then filed with the Board on February 19, 1981.

17. It was not disputed that Lisgar operates in the ICI sector of the construction industry, and is bound by the current province-wide collective agreement between the Carpenters’ Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America. Furthermore, it was not disputed that Lisgar is deemed by section 125(2) of the Act to have recognized the applicant, as an affiliated bargaining agent for all carpenters employed by it in the industrial, commercial and institutional sector of the construction industry in the applicant’s geographic jurisdiction (i.e. Board Areas 9, 10, 11 and 12).

18. Section 1(4) provides:

“(4) Where in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporation, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.”

The purpose of that legislative provision was discussed by the Board in *Brant Erecting*, [1980] OLRB Rep. July 945, at pages 948 and 949, as follows:

“Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to the employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activity under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal

form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a 'business' is transferred from one employer to another . . .

Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase 'whether or not simultaneously'. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of indicia of a 'transfer of a business' which might trigger the application of section 55. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required after it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights . . .

. . . To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act."

In *Radio Shack*, [1979] OLRB Rep. July 689, at pages 691 and 692, the Board stated:

"Section 1(4) of the Act is designed to deal with situations where more than one legal entity carries on related business or activities under common control and direction and where 'it may not make industrial relations sense to allow the legal form to dictate and possibly fragment the collective bargaining structure.' There are three conditions which must be met before the section can be applied.

- (a) There must be more than one corporation, firm or individual association or syndicate involved.
- (b) These entities must be under common control or direction, and
- (c) they must be engaged in associated or related business activities.

If these three conditions are met the Board is given a discretion under the statute to make a declaration that the entities in question constitute one employer for purposes of the Act. The Board has consistently exercised its discretion under section 1(4) to preserve rather than to extend bargaining rights. It has been reluctant, however, to make a section 1(4) declaration where the applicant union has delayed its application with the result that the declaration will impose a bargaining agent upon a group of employees who may desire a different bargaining agent or no bargaining agent at all.”

19. The present case involves more than one corporation. Moreover, the Board is satisfied on the evidence before it that Lisgar, Known and Sola are engaged in associated or related activities or businesses. Although Known originally operated primarily as a concrete specialty contractor, since 1980 Known and Lisgar have both operated as general contractors in the ICI sector of the construction industry. Sola provides “consulting services” to general contractors in that sector and has itself acted as a general contractor in that sector in the construction of the aforementioned building in which the offices of the respondents are currently located. As noted above, the associated or related activities need not be carried on simultaneously. Furthermore, it is clear from the evidence that Sola, through its principal Gino B., has the potential to operate as a general contractor in the future since it has the necessary experience, knowledge of the industry, contacts, expertise and entrepreneurial initiative. The significant extent to which the respondents’ activities are associated or related is clearly indicated by the ensuing discussion of the evidence pertaining to the issue of “common control or direction”. Thus, conditions “(a)” and “(c)” as set forth in *Radio Shack, supra*, have been met. It remains for the Board to consider whether condition “(b)” has been met and, if so, whether this is an appropriate case for the Board to exercise its discretion to grant a declaration under section 1(4).

20. The Board has indicated in a number of cases that various criteria or indicia are of some assistance in determining whether the associated or related activities or businesses are carried on under common direction or control. See, for example, *Donald A. Foley*, [1980] OLRB Rep. April 436; *Metrus Contracting*, [1979] OLRB Rep. Oct. 1009; and *Walters Lithographic Company Limited*, [1971] OLRB Rep. July 406, in which the Board considered the following criteria or indicia: (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations.

21. As indicated above, each of the three corporations is owned by a separate individual. However, the location of financial control over the companies is much less clear. Although there is no direct evidence that any of the respondents exercises total financial control over any of the others, there is evidence of rather unusual financial arrangements which have existed from time to time among the respondents, through which some degree of

financial control could be exercised. For example, as indicated above, Lisgar and Known provided Sola with substantial financial assistance by deferral of invoicing and collection of invoiced amounts with respect to construction of the building in which the three corporations currently have offices. The deferral by Lisgar of collection from Sola continued in part until October of 1980. The revision of Lisgar's lease with Sola prior to the sale of the building in 1980 also indicates that those companies do not deal with one another in a normal arm's length business manner; Lisgar voluntarily agreed to effectively double its monthly rent (from \$700 (i.e., \$1,000 less the \$300 paid to "Calbion") to \$1,400 (i.e., \$2,000 less the \$300 paid by "Calbion" and the further \$300 paid by Sola)) in order to benefit Sola by increasing the selling price which Sola's building could command. Moreover, it is evident that Sola is financially dependent upon Lisgar and Known which are the sources of most, if not all of its "consulting" revenues.

22. Gino B., who is the sole director of Sola, is also a director of Lisgar, along with Pat, and as noted above, Linda Gray, the secretary-treasurer of Lisgar, was until recently also an officer of Known. The existence or non-existence of common officers is a factor to be considered in deciding whether or not two firms are under common control or direction, but it is not necessarily the determining factor; the Board will also consider who in fact directs or controls the activities which give rise to employment: see *J.D.S. Investments Limited*, [1981] OLRB Rep. March 294; *Donald A. Foley Limited*, [1980] OLRB Rep. April 436; and *Evans-Kennedy Construction*, [1979] OLRB Rep. May 388. Tendering projects, negotiating sub-contracts and supervising work are highly significant aspects of the management of a general contracting company. The evidence demonstrates that Gino B. (through Sola) provides those and other related services to Lisgar and Known on a regular basis. Sola has provided such services to Lisgar since 1974 when it (Sola) was incorporated. The extent of such services has gradually increased from year to year. However, the Sola invoices to Known which were entered as exhibits in these proceedings indicate that after providing some services to Known in 1975, Sola provided no further services to that company until 1980, during which year it invoiced Known over \$50,000 for such services. The extent of Gino B.'s involvement in such activities (through Sola) is vividly demonstrated by his comments with respect to the construction by Known of a new mezzanine office and lunch room addition for a company in Concord, Ontario during 1980. After explaining that he billed Known approximately \$23,000 for that project, Gino B. stated: "I ran it (the project) from start to finish. All he (Gino) did was pick up the cheques." Gino B. further testified that Sola worked on all of the sites which his uncle listed in the documentation which he filed with the Board as Known's 1980 projects. Thus, it was Gino B. (through Sola) who provided much of the expertise necessary to effectively manage Known's activities as a general contractor in the ICI sector. During that same year, Lisgar, which had undertaken at least fourteen projects in Metropolitan Toronto and other areas of the province in each of the previous four years, engaged in only five projects, all of which were in Metropolitan Toronto.

23. There is a considerable degree of interrelationship of operations of the three respondents. They operate from the same premises and have a common reception area and board room. They share telephone lines and a number of expenses through an informal cost sharing arrangement. They also share the services of a bookkeeper and use the same bank, solicitors, and accountants. In addition to the extensive services which Sola provides to the other two respondents (as detailed above), Known does work for Lisgar and vice versa. Indeed, Lisgar sometimes uses Known employees (including carpenters) on Lisgar sites even though they remain on the Known payroll.

24. While there is no evidence before the Board that suggests that the companies (or any two of them) have been held out to the public as a single integrated enterprise, there is some evidence of centralized control of labour relations. Although the respondents have separate payrolls, Lisgar sometimes uses employees of Known on Lisgar projects without adding them to the Lisgar payroll. Thus, they remain on the Known payroll despite the fact that they are performing work for Lisgar. Moreover, the fact that Gino B. (through Sola) provides site supervision to both Lisgar and Known, is further evidence of such centralized control.

25. Although the aforementioned criteria or indicia do not all point in the same direction, having regard to all of the evidence before it, the Board is of the view that it is reasonable to infer that at least since 1980, the three respondents have carried on related activities or businesses under common control or direction. On May 1, 1980, *The Labour Relations Amendment Act, 1979 (No. 2)*, S.O. 1979, c. 113 (Bill 204), which had been enacted in December of 1979, came into force. Included in that legislation was section 125(2) of the Act, the effect of which was described by the Board as follows in *Hugh Murray (1974) Limited*, [1981] OLRB Rep. Jan. 34, at paragraph 9:

“9. The language of section 125(2) is somewhat complex but its effect is relatively straightforward. The sections applies to all construction activity in the industrial, commercial and institutional sector of the construction industry and its purpose is to extend bargaining rights province wide wherever a trade union had bargaining rights for the employees of an employer in a particular geographic area. One result of the section is that if a local of a trade union has bargaining rights in one part of the province, all other locals of that union in the province of Ontario are deemed to have been recognized by the employer as the representative of employees employed in the ICI sector in their respective geographic areas. These bargaining rights were to be exercised through whatever local of the . . . union has jurisdiction in that particular geographic area. Section 125(2) is one of a series of legislative amendments introduced in order to create a scheme of province wide collective bargaining, by trade, in the industrial, commercial, and institutional sectors of the construction industry. In other sectors, the pre-existing scheme of local area bargaining has been preserved.”

In his testimony before the Board on April 1, 1981, Pat stated: “I just recently learned that we were bound provincially. I’m aware of this for only the last three or four weeks.” In view of the publicity which Bill 204 received prior to its enactment and implementation, the Board is unable to believe that Pat, a sophisticated and experienced businessman who is the principal of an established general contracting firm which had construction sales of over one and three quarter million dollars in 1979, would have been unaware of the effect of that legislation on his company until March of 1981. Pat’s obvious lack of candour with respect to that matter and with respect to the degree of interdependency between Lisgar, Sola and Known confirms the Board’s view that it is reasonable to infer in the circumstances of this case that once it became apparent that Lisgar, which until then had been unionized only in the Metropolitan Toronto area, would soon become unionized on a province-wide basis, the principals of the three respondents (with the possible assistance of Scave) arranged for Known rather than Lisgar to bid on ICI projects in areas of the province other than Metropolitan Toronto since Lisgar would be precluded from performing such projects using non-union labour. Sola (and to a

lesser extent, Scave) played a pivotal role in this arrangement as it provided the managerial and other expertise necessary to permit Known, which up to that point had functioned primarily as concrete specialty contractor, to effectively function as a general contractor in the ICI sector of the construction industry in various locations outside of Metropolitan Toronto. Although there is no evidence that this arrangement resulted in any direct financial benefit to Lisgar, it is clear that it did provide a substantial financial benefit to Gino B. (through Sola). In view of the close family ties which exist among the principals of the respondents, and in view of Pat's strong desire to confer financial benefits upon his son (as evidenced by the benefits which Gino B. derived from the financial arrangements summarized in paragraph 21 of this decision), it is reasonable to infer that Pat would view with favour and desire to support such an arrangement because it would keep the work in question in the Bifulchi family and provide a substantial financial benefit to his son. In deciding this matter, the Board has also taken into account the fact that Gino B. was an evasive witness whose original non-compliance with the requirements of section 1(5) of the Act necessitated an adjournment of the hearing and a Board order directing him to produce a number of relevant documents as the continuation of hearing; when those documents were ultimately produced, they revealed a far greater degree of functional coherence and interdependence among the three respondents than had been indicated by the previous testimony of Pat, Gino and Gino B.

26. It was argued on behalf of the respondents that even if the Board found that the three conditions specified in section 1(4) had been met, it should decline to grant a declaration under that provision because of delay. However, on the basis of all the evidence before it, the Board is of the view that the applicant proceeded expeditiously to protect its bargaining rights by filing this application with dispatch once it became aware of a potential erosion of those rights. There is nothing to suggest that the applicant has slept on its bargaining rights in the instance case. The applicant did not acquire any bargaining rights for Lisgar until section 125(2) of the Act came into force on May 1, 1980, and there is no evidence before the Board that Known (or Sola) submitted tenders or had any other involvement with respect to any projects within the applicant's geographic jurisdiction (Board areas 9, 10, 11 and 12) before January of 1981 when it bid on the Cobourg sewage treatment plant, which bid gave rise to the present application.

27. Having regard to all of the evidence before it and the submissions of the parties, the Board in the exercise of its discretion under section 1(4) declares that the respondents United Shelters Ltd., c.o.b. as Lisgar construction Co.; Known Construction Company; and 281981 Ontario Limited, c.o.b. as Sola Developments Co., are one employer for the purposes of the Act, and the Board further declares that the respondents are bound by the current collective agreement between the Carpenters' Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America.

0552-80-R; 0553-80-M Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Valentine Enterprises Contracting Limited** and Trans-Nation Incorporated, Respondents.

Practice and Procedure – Related Employer – Parties to related employer application agreeing to await outcome of similar application by different union – Whether finding by Board that employers not related binding on parties to present application – Whether *res judicata* – Whether section 1(4) finding binding on non-parties

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: D. J. Wray and P. Robichaud for the applicant; R. B. Cumine for the respondent, Valentine Enterprises, and A. Hill for the respondent, Trans-Nation.

DECISION OF THE BOARD; June 9, 1981

1. These matters involve an application under section 1(4) of *The Labour Relations Act*, together with the referral of a grievance under section 112a, and are hereby consolidated.

2. The very issue underpinning these applications, the “related-employer” status of Trans-Nation Incorporated and Valentine Enterprises Contracting, was before the Board in a similar application (Board File No. 0448-80-R) brought by a different trade union, the Labourers’ International Union of North America, Local 506. That application involved the same job, the reconstruction of the King Edward Hotel in Toronto, as the present, and was filed a few days subsequent to the present application. Shortly before the hearing of the present application, the Carpenters learned that the Labourers also had filed an application, which was coming on for hearing before the Board two days prior to theirs. It was thereupon agreed by the parties to the present application that it be held in abeyance pending the decision of the Board in the Labourers’ application.

3. The Board rendered its decision in the Labourers’ application on December 11, 1980, finding “that Trans-Nation and Valentine are not associated or related, and accordingly, that they may not be treated as one employer”. The respondent employers now take the position that the finding of the Board in that decision is binding with respect to, and is determinative of, the present application. The respondent Valentine Enterprises Contracting Limited relies upon the prior agreement of the parties as the foundation for that conclusion. The applicant, on the other hand, denies any agreement that the decision in the Labourers’ application would be binding upon it. The applicant takes the position that the decision is not binding upon it, not having been a party to or participated in the Labourers’ application, and that it now wishes to place before the Board further material evidence which has come to light, and which the Board did not have before it in the prior application.

4. An agreement of the parties to hold a matter in abeyance until a similar application is decided is readily understandable, in an effort to avoid multiplicity of proceedings. It does not follow, however, that such an agreement will go so far as to provide that a decision in one

application will conclusively determine the second. The agreement may simply be to await the guidance which the other application is likely to provide. Because the Board itself is expected to be logically consistent in its decisions, such an arrangement in the great majority of cases does, as a practical matter, permit the parties to dispose on their own of other applications on the basis of the Board's initial decision. The evidence in the present case falls short, however, of establishing an agreement amongst the parties to actually be "bound" by the results of the Labourers' application. The present applicant has assessed with counsel the decision in the Labourers' case, and feels it can still succeed on the basis of different evidence which it will place before the Board.

5. As the Board noted in *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501, paragraph 13, the application by it of a principle analogous to *res judicata* has now been clearly approved by the Courts. At the same time, however, the Board carefully noted the conditions precedent to that application:

It is clear from the two *Radio Shack* decisions that the Court has sanctioned the use of a doctrine analogous to *res judicata* — at least between the same parties. It is also evident that in approving that use, the Court sought to accommodate both the rights of a party to a fair hearing, and the practical or administrative problems which might arise if issues previously resolved between the parties had to be relitigated. The Court was careful to point out, however, that the requirements of natural justice had been satisfied because the findings subsequently relied on by the Board had been established in an earlier proceeding between the same parties in which both had a full opportunity to present their evidence and make their submissions. Such is not the case in the matter presently before us.

For the same reasons, the plea of *res judicata* is not available in the present case. The parties might have agreed to consolidate the present application with the Labourers' application, so as to enable the Carpenters a full opportunity to participate, but they did not. Or they could have expressly agreed to be bound by the results of the Labourers' case. But the Board finds they did not.

6. Counsel for neither of the respondents took the position that the Carpenters would be precluded from now presenting any relevant evidence to the Board on a section 1(4) application, but both argued that the Carpenters should be required to file a fresh application in order to do so. The Board ruled at the hearing, for the foregoing reasons, that it could find no basis upon which to require the Carpenters to file a fresh application; rather, the Board pointed out that any issue as to relief arising out of a question of delay could appropriately be addressed in the context of the present application.

7. One further argument put forward by counsel for Trans-Nation was that a finding by the Board under section 1(4) of the Act is binding upon all persons, whether parties or not, at least as of the time the application was made. In support of this, counsel relied upon the words emphasized below in section 1(4) itself, together with the definition of "Board" in section 1(1)(c). These sections provide:

1.-(4) Where, *in the opinion of the Board*, associated or related activities or businesses are carried on, whether or not simultaneously, by or

through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

1.-(1) In this Act,

(c) “Board” means the Ontario Labour Relations Board.

This argument essentially asks for a recognition that a declaration of the Board under section 1(4) of the Act is a finding *in rem*; otherwise, to reach the result argued for, it would be necessary for the Board, as a matter of natural justice, to give notice of a section 1(4) proceeding to any and all parties in the province whom the Board would ultimately wish to bind. The Board in *Oakwood Park Lodge, supra*, expressed its reluctance to conclude that findings it has made under *The Labour Relations Act* are decisions *in rem*, and counsel here cited no authority to persuade the Board that different considerations would apply to a finding under section 1(4). The words, “in the opinion of the Board” only serve to emphasize the exclusive and discretionary nature of the particular finding which the Board makes under section 1(4). There is, in the Board’s view, nothing in the section which gives to that finding, once made, any more force and effect than if the words “in the opinion of the Board” were not present, or than a finding which the Board has to make under any other section of the Act. The recognition which counsel points out to be implicit in section 1(1)(c), that the different panels of the Board speak as one “Board” for the purposes of the Act, goes no further than to ensure that proper effect is given to decisions from panel to panel in accordance with the otherwise established principles of *res judicata* and *stare decisis*. If a decision under section 1(4) cannot otherwise be said to be *in rem*, therefore, and binding upon different parties in a subsequent proceeding, it does not assist the respondent to observe that, when the first panel issued its ruling in the Labourers’ application, it was speaking as “the Board”.

8. The Board accordingly ruled orally that this application be scheduled for continuation of hearing on its merits, and suggested that the parties might have regard, from the point of view of expediting the proceedings, to the fact that precisely the same issue was examined by the Board in the Labourers’ application.

2604-80-R Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C., Applicant, v. **Westgate Nursing Home Inc.**, Respondent, v. Group of Employees, Objectors.

Certification – Petition – Employee in position of favour with employer circulating petition – Suggesting loss of jobs if union successful – Whether affecting voluntariness of petition

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: C. M. Mitchell, P. Marier, J. Nicholls and D. Burshaw for the applicant; K. W. Kori and R. Bond for the respondent; J. F. O'Brien for the objectors.

DECISION OF THE BOARD; June 11, 1981

1. This is an application for certification.
2. The name: "Westgate Lodge Nursing Home" appearing in the style of cause of this application as the name of the respondent is amended to read: "Westgate Nursing Home Inc."
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Belleville, Ontario, save and except graduate and registered nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. There were filed in this matter, in timely fashion, two petitions expressing opposition to the certification of the applicant trade union in the following terms:

"THE LABOUR RELATIONS BOARD

BETWEEN:

Service Employees International Union, Local 183, A.F. of L.,
C.I.O., C.L.C.

Applicant

–and–

Westgate Lodge Nursing Home

Respondent

PETITION

IN THE MATTER of the application of the Applicant on the 25th day of February, 1981, to be certified as bargaining agent of employees of the Respondent in the following bargaining unit:

‘All employees of the Respondent in Belleville, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisors, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.’

WE the undersigned employees affected by the application are opposed to the certification of the Applicant and desire to make representations to the Board through our representative.”

6. In the absence of the petitions, which were signed by twelve persons, the applicant would be entitled to be certified without a representation vote. However, the overlap between the persons who signed membership cards in the applicant and the persons who signed the petitions is sufficient that the Board would exercise its discretion to direct a representation vote if the Board were satisfied of the voluntariness of the petition. Accordingly, the usual inquiry (into the origination of the petitions and the manner in which each signature on them was obtained) contemplated by Rule 48 of the Rules of Procedure was conducted.

7. The signatures on the petitions were witnessed by Adeline Haley and Marjorie Burns on March 5th and 9th, 1981. After reading the green sheet (Notice to Employees of Application for Certification and of Hearing (Form 5)), Mrs. Burns and Mrs. Haley decided to consult with Harold O'Brien, a lawyer whom Mrs. Haley had known for a long time. On their instructions Mr. O'Brien drafted the petitions and arranged for them to be typed. Mrs. Haley then spoke on the telephone with a number of employees of the respondent to advise them of the existence of the petitions and to encourage them to sign. During one such conversation with an employee who subsequently signed one of the petitions, Mrs. Haley noted that the employee “had a teenage boy to raise”. Mrs. Haley was quite evasive when asked by counsel for the applicant what she meant by that comment. Initially she responded very softly: “She needed the money likely.” Upon being asked to repeat her almost inaudible answer, she said: “I don't know”. The cross-examination then proceeded as follows:

“Question: What does having a teenage son have to do with the petition?

Answer: She needs the work.

Question: Why would you say such a thing?

Answer: It must have been a figure of speech.

Question: It's not a very subtle figure of speech is it?

Answer: I don't know.”

It is reasonable to infer that Mrs. Haley intended to imply by that comment that the employment of the other party to that conversation would be in jeopardy if she did not sign the petition. The probable effect of such statement on an employee can only be properly assessed in the light of employee perceptions concerning Mrs. Haley's position with the respondent and her relationship with the principals of the respondent.

8. Mrs. Haley has been the respondent's activity director for six years. Immediately prior to that, she was employed by the principals of the respondent (Mr. and Mrs. Bond) "at their other nursing home". When they "went to a larger nursing home", she "came along". Although she vigorously denied having any special relationship with the Bonds despite extensive cross-examination by union counsel concerning that matter during her initial testimony before the Board, she ultimately revealed during her cross-examination as a reply witness that she receives "an annuity" from them (or from the respondent at their behest) as an "annual gift" which she has received for four years. It was also her evidence that to the best of her knowledge, the only other persons who receive such payments are two members of management, namely, the Director of Nursing and the Food Supervisor.

9. It appears from the evidence before us that Mrs. Haley does not in fact exercise managerial functions. However, in determining the voluntariness of a petition, the Board is concerned not with the actual authority or proximity to managerial authority of the person who circulates it, but rather with that employees reasonably perceived that person's authority or proximity to managerial authority to be. Thus, the Board will consider whether employees reasonably perceived the circulator as having managerial powers or as being in greater proximity to managerial authority than other employees (see, for example, *Fibre Therm Corp.*, [1980] OLRB Rep. Aug. 1196, and *Dad's Cookies Ltd.*, [1976] OLRB Rep. Sept. 545). The Board has adopted this approach in recognition of the delicate and responsive nature of the employer-employee relationship which gives rise to a natural desire by employees to appear to identify with the interests and wishes of their employer. The Board must be satisfied on the balance of probabilities that the signatories of a petition signed it out of genuine opposition to the union and not out of concern that their failure to sign would be communicated to the employer, or could result in reprisals (see *Peacock Lumber Ltd.*, [1979] OLRB Rep. May 423, and *Radio Shack*, [1978] OLRB Rep. Nov. 1043).

10. In the present case there is evidence that a number of the employees reasonably perceived Mrs. Haley as being in greater proximity to managerial authority than other employees. Although it appears that employees were not aware of the exact nature of the annuity payments which Mrs. Haley has been receiving for the past four years, at least some of the employees were aware that she has been receiving sums in addition to her normal remuneration. This was confirmed by Mrs. Burns who testified during cross-examination that she thought that some of the employees were of the view that Mrs. Haley, the Director of Nursing and the Food Supervisor own shares in the respondent. Another employee testified that she and other employees of the respondent "feel that Mrs. Haley is part of management" as "she (Mrs. Haley) is in on the share profiting of Westgate Lodge". It is also clear from the evidence that Mrs. Haley is perceived by at least some of the employees to be a friend of the Bonds. Thus, the Board finds that Mrs. Haley was reasonably perceived by at least some of the employees as being in greater proximity to managerial authority than other employees.

11. One of the employees who signed the petition testified that Mrs. Haley telephoned her and told her that if she did not sign the petition she would "lose [her] full-time job and go

down to part-time and other staff could bump [her] off [her] job". She further testified: "I was really scared . . . as soon as she (Mrs. Haley) said I would lose my job or go down to part-time. I've got to support myself. If I went down to part-time I would never get by." Mrs. Haley denied having made any such statement. However, Mrs. Haley's demeanour as a witness, including her evasiveness during cross-examination and lack of candour concerning a number of matters, have led the Board to conclude that she was not a credible witness. Having regard to that factor and to the aforementioned comment about the teenage son which Mrs. Haley admitted to be part of her discussion with another signatory, the Board finds that Mrs. Haley did expressly or implicitly indicate to at least two signatories of the petitions that loss of employment or reduction of hours would be potential consequences of failing to sign a petition against the applicant. Although Mrs. Haley is not in a position to personally effect such changes, in view of the relatively close relationship which she was reasonably perceived to have with the principals of the respondent, it would have been reasonable for employees to conclude that Mrs. Haley was relaying to them information which she had received from the owners or managers of the respondent. (In fairness to the respondent it should be noted, however, that there is no evidence that management was in fact the source of any such information.) Mrs. Burns, who witnessed several of the signatures on the petitions, encouraged employees to sign the petitions by telling them that if the union is certified "there'll be quite a few things taken away from [employees] that [they] already have". She mentioned their birthday holiday and their Christmas party as examples of existing benefits which could be lost in the event that the applicant was certified as their bargaining agent.

12. The burden of proving on the balance of probabilities that a petition represents a voluntary statement of desire on the part of the employees who signed it lies upon the objectors (see *Fibre Therm Corp.*, *supra*, and *Leamington Vegetable Growers Co-operative Limited*, [1974] OLRB Rep. June 402). Having regard to all of the evidence before it, the Board finds that the objectors have not discharged that burden in this case and that the petitions do not cast doubt upon the continued support of the members of the applicant for its certification.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 10, 1981, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1981

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0993-79-R: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant/Complainant) v. Research Foods (1976) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (32 employees in unit).

1684-79-R: Canadian Union of Public Employees, (Applicant) v. Barton Place Nursing Home, (Respondent).

Unit #1: "all employees employed as Graduate Nursing Staff at Barton Place Nursing Home in Toronto, save and except "Supervisors", persons above the rank of "Supervisor", and persons regularly for not more than twenty-four (24) hours per week, and students employed during school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees employed as Graduate Nursing Staff for not more than twenty-four (24) hours per week and students employed during the school vacation period at Barton Place Nursing Home in Toronto, save and except "Supervisors", and persons above the rank of "Supervisors." (2 employees in unit). (*Having regard to the agreement of the parties*).

0237-80-R: Canadian Union of Public Employees, (Applicant) v. The Children's Aid Society of the Regional Municipality of Halton, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Halton, save and except Executive Director, Secretary to Executive Director, Comptroller, Supervisor of Alternate Care, Office Manager, Supervisor of Family Services, Family Resource Team Leader, Special Services Supervisor/Co-ordinator Volunteer Dept., persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (49 employees in unit). (*Having regard to the agreement of the parties*).

1545-80-R: International Leather Goods, Plastics and Novelty Workers Union, Local No. 8, (Applicant) v. Weldo Plastics Limited and Nelson Burns & Company Ltd., (Respondents) v. Group of Employees, (Objectors).

Unit #1: "all employees of Weldo Plastics Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (43 employees in unit). (*Having regard to all of the evidence before it and the submissions of the parties*).

Unit #2: "all employees of Nelson Burns & Company Ltd. in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

1593-80-R: Teamsters Local Union. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Frito-Lay Canada Ltd., (Respondent) v. Group of Employees, (Intervenors).

Unit: "all route salesmen employed by the respondent working at Mississauga, Ontario, save and except district sales manager, persons above the rank of district sales manager, warehousemen, office staff, and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*).

1798-80-R: Ontario Nurses' Association, (Applicant) v. York County Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all registered and graduate nurses engaged in a nursing capacity by York County Hospital Corporation in the Municipality of York, Newmarket, Ontario, save and except head nurses, persons above the rank of head nurse and persons regularly employed for not more than 24 hours per week." (employees in unit). (*Having regard to the agreement of the parties*).

2008-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. Peel Condominium Corporation No. 115, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 3100 Kirwin Avenue, Mississauga, Ontario, including resident superintendents, save and except property manager, office and clerical staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

2012-80-R: Canadian Union of Public Employees, (Applicant) v. Corporation of the Township of East Zorra-Tavistock, (Respondent).

Unit: "all employees of the Roads Department in the Township of East Zorra-Tavistock, in the County of Oxford, save and except the Superintendent, those above the rank of Superintendent and Office staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

2337-80-R: Union of Bank Employees (Ontario), Local 2104, (Applicant) v. Atomic Energy Employees (Deep River) Credit Union Limited, (Respondent).

Unit: "all employees of the respondent at Deep River, Ontario, save and except Manager, Management-Trainee, Office Manager, Receptionist-Typist, and persons regularly employed for not more than twenty-four (24) hours per week." (18 employees in unit). (*Having regard to the agreement of the parties*).

2588-80-R: Office and Professional Employees International Union, (Applicant) v. Stelco Employees' (Primary Works) Credit Union Limited, (Respondent).

Unit: "all office employees of the respondent in Nanticoke, Ontario, save and except supervisor, persons above the rank of supervisor and persons regularly employed for not more than twenty-four (24) hours per week." (2 employees in unit). (*Having regard to the agreement of the parties*).

2639-80-R: Local Union 636, International Brotherhood of Electrical Workers, A.F.L., C.I.O., C.L.C., (Applicant) v. The Public Utilities Commission of the City of Barrie, (Respondent) v. Employee, (Objector).

Unit: "all office, clerical and technical employees of the respondent save and except supervisors, persons above the rank of supervisor, Supervisor-Engineering and Office Section (Water), Chief-Clerk, Accountant, Computer Services Co-Ordinator, Senior Engineering Assistant, Secretary to the General Manager, Secretary to the Secretary-Treasurer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and those persons covered by subsisting collective agreements." (23 employees in unit). (*Having regard to the agreement of the parties*).

2656-80-R: Ontario Nurses' Association, (Applicant) v. Beacon Hill Lodges of Canada Ltd. Hamilton, (Respondent) v. Group of Employees, (Objectors).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Hamilton, Ontario save and except the Associate Resident Care Director, Director of care and persons above the rank of Director of Care." (employees in unit). (*Having regard to the agreement of the parties*).

2672-80-R: Food and Service Workers of Canada (formerly Canadian Food and Associated Services Union), (Applicant/Compainant) v. Zum Rudy's Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff, musicians, and chefs exercising managerial functions." (46 employees in unit). (*On agreement of the parties*).

2694-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Gouchie's Foodmarket Limited, (Respondent).

Unit: "all employees of the respondent in Sault Ste. Marie, save and except meat manager, assistant store manager and persons above the rank of meat manager and assistant store manager." (27 employees in unit). (*Clarity Note*).

2695-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Gouchie's Foodmarket Limited, (Respondent).

Unit: "all employees of the respondent in Sault Ste. Marie, save and except meat manager, assistant store manager and persons above the rank of meat manager and assistant store manager." (60 employees in unit). (*Clarity Note*).

2765-80-R: National Council of Canadian Labour, (Applicant) v. Chateau Manufacturing Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Paris, Ontario save and except foremen, persons above the rank of foreman, shipper-receiver, maintenance designer, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (36 employees in unit). (*Having regard to the agreement of the parties*).

2767-80-R: United Brotherhood of Carpenters & Joiners of America, Local 1256, (Applicant) v. Dixxin Construction Ltd., (Respondent).

Unit: "all carpenters and carpenters" apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in the County of Lambton, save and except non-working foreman and persons above the rank of non-working foreman." (2 employees in unit).

2804-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Kast Engineering and Construction Limited, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, and excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0010-81-R: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. J. A. V. Nursing Home Ltd. operating as Beverly Hills Lodge, (Respondent).

Unit #1: "all employees of the respondent at its nursing home at Brantford, Ontario, save and except office staff, professional medical staff, registered, graduate and undergraduate nurses, physiotherapists, occupational therapists, director of activities, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at its nursing home at Brantford, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except office staff, profession medical staff, registered, graduate and undergraduate nurses, physiotherapists, occupational therapists, director of activities, supervisors and persons above the rank of supervisor." (27 employees in unit).

0012-81-R: Hotel, Restaurant & Cafeteria Employees Union — Local 75, (Applicant) v. Filkon Food Services Limited c.o.b. as By The Way Frozen Yogurt, (Respondent).

Unit #1: "all employees of the respondent at By The Way Frozen Yogurt in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at By The Way Frozen Yogurt in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

0044-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Global Insulating Systems Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (19 employees in unit). (*Having regard to the agreement of the parties*).

0065-81-R: Ontario Nurses Association, (Applicant) v. Villa Columbo Homes for the Aged Inc., (Respondent).

Unit: #1: "all registered and graduate nurses engaged in a nursing capacity, employed by the respondent in the Municipality of Metropolitan Toronto, save and except the assistant-director of nursing, persons above the rank of assistant-director of nursing, and nurses employed for not more than twenty-four (24) hours per week." (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit: #2: "all registered and graduate nurses engaged in a nursing capacity by the respondent in the Municipality of Metropolitan Toronto, who are regularly employed for not more than twenty-four (24) hours per week, save and except the assistant-director of nursing and persons above the rank of assistant-director of nursing." (4 employees in unit). (*Having regard to the agreement of the parties*).

0090-81-R: Ontario Public Service Employees Union, (Applicant) v. Area Municipality of the Town of Bracebridge, (Respondent).

Unit: "all employees of the respondent at Bracebridge, Ontario, save and except managers, persons above the rank of manager, office and clerical employees, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement." (6 employees in unit). (*Having regard to the agreement of the parties*).

0091-81-R: United Steelworkers of America, (Applicant) v. Stran-Steel Division, Westeel-Rosco Limited, (Respondent).

Unit: "all employees of the respondent at Richmond Hill, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (49 employees in unit). (*Having regard to the agreement of the parties*).

0102-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Conduits-Amherst Limited, (Respondent).

Unit: "all employees of the respondent at 1600 Britannia Road East in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (33 employees in unit). (*Having regard to the agreement of the parties*).

0106-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Tacc Construction Co. Ltd., (Respondent).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0109-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Doubleday Canada Limited, (Respondent).

Unit: "all employees of the respondent at its Mississauga warehouse save and except foremen, persons above the rank of foremen, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (53 employees in unit). (*Having regard to the agreement of the parties*).

0110-81-R: United Steelworkers of America, (Applicant) v. International Mill Services, division of International Utilities Holdings, Inc., (Respondent)

Unit: "all employees of the respondent in L'Original, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

0112-81-R: Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Applicant) v. Empco-Fab Ltd., (Respondent).

Unit: "all employees of the respondent at Whitby, Ontario, save and except foremen, persons above the rank of foreman, office and Clerical staff, draughtsmen, watchmen, guards and persons engaged in field fabrication work." (43 employees in unit). (*Having regard to the agreement of the parties*).

0119-81-R: Canadian Paperworkers Union, (Applicant) v. Buntin Reid Paper, Division of Domtar Inc., (Respondent).

Unit: "all office, clerical and technical employees of the respondent in London, Ontario, save and except Assistant Managers, persons above the rank of Assistant Manager, Salesmen and those covered by a previous certificate issued to the Canadian Paperworkers Union on the 27th day of February, 1981." (3 employees in unit). (*Having regard to the agreement of the parties*).

0140-81-R: United Steelworkers of America, (Applicant) v. Northern and Central Gas Corporation Limited, (Respondent).

Unit: "all office and clerical employees of the respondent at North Bay, Ontario, save and except supervisors, persons above the rank of supervisor, technical personnel, sales staff, the administrative secretary to the Manager of Customer Service and Construction, the confidential secretary to the Manager of Industrial Relations, and persons covered by a subsisting agreement." (19 employees in unit). (*Having regard to the agreement of the parties*).

0141-81-R: Service Employees Union, Local 204, A.F.L.-C.I.O.-C.L.C., (Applicant) v. The Greater Niagara Association for the Mentally Retarded on behalf of Children's Core Residence, (Respondent).

Unit: "all employees of the respondent at Children's Core Residence in Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, office staff and persons regularly employed for not more than twenty-four (24) hours per week." (7 employees in unit). (*Having regard to the agreement of the parties*).

0142-81-R: Service Employees Union, Local 204, A.F.L.-C.I.O.-C.L.C., (Applicant) v. The Greater Niagara Association for the Mentally Retarded on behalf of Children's Core Residence, (Respondent).

Unit: "all employees of the respondent at Children's Core Residence in Niagara Falls, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor and office staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

0143-81-R: Ontario Nurses' Association, (Applicant) v. Bestview Holdings Limited, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity, by the respondent in Sarnia, Ontario, save and except director of nursing and persons above the rank of director of nursing." (4 employees in unit). (*Having regard to the agreement of the parties*).

0144-81-R: The Canadian Union of Public Employees, (Applicant) v. The Board of Education for the City of Toronto, (Respondent).

Unit: "all employees of the respondent within the City of Toronto, regularly employed in the plant operations and maintenance and construction departments for not more than 24 hours per week and students, save and except office, clerical and technical staff, chief caretakers, stationary engineers appointed to engineering positions, tradesmen/tradeswomen, drivers, drivers' helpers, watchmen, watchwomen and persons covered by subsisting collective agreements." (82 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0159-81-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Markville Investments Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0162-81-R: Canadian Union of Public Employees, (Applicant) v. River Glen Haven Nursing Home, (Respondent).

Unit #1: "all employees of the respondent at Sutton, Ontario, save and except professional medical staff, registered and graduate nurses, technical personnel, office staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed

during the school vacation period.” (21 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at Sutton, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except professional medical staff, registered and graduate nurses, technical personnel, office staff, supervisors and persons above the rank of supervisor. (21 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0165-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Trim Fab Limited, (Respondent).

Unit: “all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (124 employees in unit). (*Having regard to the agreement of the parties*).

0168-81-R: Chicopee Manufacturing Employees’ Association, (Applicant) v. Chicopee Manufacturing Limited, (Respondent).

Unit: “all the employees of the respondent at the City of Kitchener, in the Regional Municipality of Waterloo, below the rank of foreman and excluding office staff, dispatchers, students employed during the school vacation period, and persons regularly employed for not more than twenty-four (24) hours per week.” (137 employees in unit). (*Having regard to the agreement of the parties*).

0182-81-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Gillies-Guy, a Division of Ultramar Canada Inc., (Respondent).

Unit: “all employees of the respondent in Ancaster, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and persons covered by subsisting collective agreement.” (3 employees in unit). (*Having regard to the agreement of the parties*).

0183-81-R: Service Employees International Union, Local 532, (Applicant) v. Mountain Nursing Home Limited, (Respondent).

Unit: “all employees of Mountain Nursing Home Limited in Hamilton, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except professional nursing staff, supervisor, foreman, persons above the rank of supervisor or foreman, and office staff.” (64 employees in unit). (*Having regard to the agreement of the parties*).

0195-81-R: Canadian Union of Public Employees, (Applicant) v. Sault Ste. Marie & District Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the City of Sault Ste. Marie, in the District of Algoma, Ontario, save and except office and clerical staff, program supervisor and persons above the rank of program supervisor, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (61 employee in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0277-81-R: Hotel, Motel and Restaurant Employees and Beverage Dispensers’ Union Local 757, Thunder Bay, of the Hotel and Restaurant Employees and Bartenders’ International Union, A.F.L. — C.L.C., (Applicant) v. Lankhead Developers Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent employed at Thunder Bay, save and except department heads,

persons above the rank of department head, assistant housekeeper, assistant restaurant manager, assistant bar manager, maintenance department employees, confidential secretary to the manager, night auditor, accounting department clerks and students hired during the school vacation period, other than those also employed during the school year." (142 employees in unit). (*Having regard to the agreement of the parties*).

0236-81-R: Christian Labour Association of Canada, (Applicant) v. 412284 Ontario Limited carrying on business as Pine Grove Nursing Home, (Respondent).

Unit: "all employees of the respondent at Pine Grove Nursing Home in Pine Grove, Ontario, save and except registered and graduate nurses, directors of nursing and administrator." (31 employees in unit). (*Having regard to the agreement of the parties*).

0241-81-R: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Tuzi Brothers Painting & Decorating, (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0244-81-R: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant) v. Sunny Orange, a division of McCain Foods Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons covered by a subsisting collective agreement, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

0257-81-R: United Steelworkers of America, (Applicant) v. Lipman-Levinter Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

0262-81-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128, (Applicant) v. Vacuum Anchor Corporation, (Respondent).

Unit: "all employees of the respondent working at or out of Sarnia, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff and engineers." (17 employees in unit). (*Having regard to the agreement of the parties*).

0280-81-R: Ontario Taxi Association 1688 C.L.C., (Applicant) v. Shamrock Taxi, (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the City of Orillia, save and except foremen, those above the rank of foremen and supervisors." (12 employees in unit).

0281-81-R: Ontario Taxi Association 1688 C.L.C., (Applicant) v. Action Cabs, (Respondent).

Unit: "all employees of the respondent in the City of Orillia, save and except foremen, those above the rank of foremen and supervisors." (25 employees in unit).

Applications Certified Subsequent to a Post-Hearing Vote

2111-80-R: The Elk Lake Planing Mill Employees Association, (Applicant) v. Elk Lake Planing Mill Limited, (Respondent) v. Lumber and Sawmill Workers Union, Local 2995, (Intervener).

Unit: "all employees of the respondent in Elk Lake, Ontario, engaged in sawmill, planing mill and yard operations, save and except foremen, persons above the rank of foreman and office staff." (68 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		98
Number of persons who cast ballots	85	
Number of ballots marked in favour of applicant	49	
Number of ballots marked in favour of intervener	16	
Ballots segregated and not counted	20	

2566-80-R: Canadian Union of Public Employees, (Applicant) v. The Board of Education for the Borough of East York, (Respondent) v. Carpenters' District Council of Ontario and Vicinity, (Intervener).

Unit: #1: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and persons covered by subsisting collective agreements." (16 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent in Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, and persons covered by subsisting collective agreements." (45 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0186-79-R: Christian Labour Association of Canada, (Applicant) v. Master Insulation Company Limited, (Respondent) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Intervener).

0502-79-R: Chatham Construction Workers Association, Local No. 53 affiliated with Christian Labour Association of Canada, (Applicant) v. Ramac Solar Systems, (Respondent).

2455-79-R: Canadian Union of Educational Workers, (Applicant) v. York University, (Respondent).

0014-80-R: The United Brotherhood of Steeplejacks and Allied Trades of Canada, (Applicant) v. A. N. Shaw Restoration Ltd., (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Restoration Steeplejacks Local Union No. 172, (Intervener #1) v. The International Union of Bricklayers and Allied Craftsmen The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Intervener #2) v. Toronto-Central Ontario Building and Construction Trades Council, (Intervener #3) v. The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America, (Intervener #4).

1663-80-R: Greater Northern Ontario Trucking Association, (Applicant) v. Alexander Centre Industries Limited, (Respondent).

0074-81-R: United Brotherhood of Carpenters and Joiners of America Local Union 1190, (Applicant) v. Scott Developments, (Respondent).

0170-81-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union 71, (Applicant) v. Camille's Plumbing and Heating Ltd., (Respondent).

0199-81-R: The Canadian Union of Educational Workers, (Applicant) v. Queen's University, (Respondent).

0318-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446.

Certifications Dismissed Subsequent to a Pre-Hearing Vote

2176-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant/Complainant) v. A. Stork & Sons Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foremen, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (38 employees in unit).

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	17

2446-80-R: Retail, Commercial & Industrial Union, Local 206 Chartered by United Food & Commercial Workers International Union, (Applicant) v. Canteen of Canada Limited, (Respondent).

Unit: "All office employees of the respondent at Cambridge, Ontario save and except office manager, persons above the rank of office manager and sales staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5

2721-80-R: United Steelworkers of America, (Applicant) v. Kolmar of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the Respondent Company in Barrie, Ontario, save and except foremen and foreladies, persons above the rank of foreman or forelady, technicians, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and persons employed during a school vacation period." (207 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	220
Number of persons who cast ballots	211
Number of ballots marked in favour of applicant	62
Number of ballots marked against applicant	131
Ballots segregated and not counted	18

2801-80-R: The Association of Allied Health Professionals Ontario, (Applicant) v. The Trustees of the Ottawa Civic Hospital, (Respondent).

Unit: "all employees of the social work department of The Trustees of the Ottawa Civic Hospital at Ottawa, save and except the department head and the first assistant to the department head and the first assistant to the department head, persons regularly employed for not more than 24 hours per week, and persons covered by the subsisting collective agreements entered into by The Trustees of the Ottawa Civic Hospital." (18 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	10

0005-81-R: International Ladies' Garment Workers' Union, (Applicant) v. Vogue Brassiere Incorporated, (Respondent).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (63 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	58
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	39

0127-81-R: International Woodworkers of America, (Applicant) v. Trimco Woods Limited, (Respondent).

Unit: "all persons of the respondent in Bolton, Ontario, save and except foremen, foreladies, persons above the rank of office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (35 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	25
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	14
Ballots segregated and not counted	2

Certifications Dismissed Subsequent to a Post-Hearing Vote

2005-80-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of Wainfleet, (Respondent).

Unit: "all employees of the Respondent in the Township of Wainfleet save and except clerk treasurer, arena manager, roads superintendent, roads foreman, drainage commissioner, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (18 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots marked against applicant	7
Number of ballots marked against applicant	7
Ballots segregated and not counted	1

SECOND VOTE

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots		15
Number of ballots marked in favour of applicant	3	
number of ballots marked against applicant	12	

2678-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Balderson Cheese Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Balderson, save and except production supervisor, office staff, salespersons, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list at start of vote		45
Number of persons who cast ballots		38
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	22	

2679-80-R: International Union, United Automobile, Aerospace and Agircultural Implement Workers of America, (U.A.W.), (Applicant) v. Teledyne Canada Metal Products, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Woodstock, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (108 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		86
Number of persons who cast ballots		85
Number of ballots marked in favour of applicant	40	
Number of ballots marked against applicant	45	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0138-81-R: Service Employees' Union, Local 478, (Applicant) v. Nipissing Area Joint Hospitals' Laundry Inc., (Respondent).

0139-81-R: United Steelworkers of America, (Applicant) v. Riverwood Furniture Ltd., (Respondent).

0160-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. King Cross Contracting Limited, (Respondent).

0161-81-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L.-C.I.O.-C.L.C.), (Applicant) v. V.I.P. Hotels Limited, carrying on business as The Sutton Place Hotel, (Respondent).

0186-81-R: Health, Office and Professional Employees Local 1976, U.F.C.W., (Applicant) v. The Corporation of the Regional Municipality of Haldimand-Norfolk (Norview Home for the Aged), (Respondent).

0196-81-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Ottawa Taxi Holdings Ltd., (Respondent) v. Group of Employees, (Objectors).

0228-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Wm. Groves Ltd., (Respondent).

0232-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. Dan Grady Plumbing Limited, (Respondent).

0251-81-R: Canadian Brotherhood of Railway and Transport and General Workers, (Applicant) v. Cara Urban Restaurant/Inn Division, (Respondent).

0278-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Zicardo Drain & Concrete Ltd., (Respondent).

0279-81-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Hamilton Automobile Club, (Respondent).

0282-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. A B C Taxi (Ottawa Taxi Holdings Limited.), (Respondent).

0297-81-R: The Canadian Union of Public Employees, (Applicant) v. The Corporation of the City of Brampton, (Respondent).

0298-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Ray Fathi (Taxi), (Respondent).

0304-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Best (Taxi), (Respondent).

0319-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Via Motta Forming Ltd., (Respondent).

APPLICATIONS UNDER SECTION 1(4)

1608-78-R: The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, (Applicant) v. Ontario Erectors Association and Ferro Erectors (Toronto) Limited and Ferro Structural Steel (Toronto) Limited, (Respondent). (*Dismissed*).

1826-80-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Contempoform Incorporated and CTF Construction Ltd., CTF Contracting, (Respondents). (*Granted*).

2195-80-R: Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. 449637 Ontario Inc., carrying on business under the name and style of Rivard Mechanical, Michel Rivard Plumbing Limited, carrying on business under the name and style of Rivard Plumbing, J. G. Rivard Limited, J. G. Rivard (Quebec) Limited, (Respondents). (*Dismissed*).

2343-80-R: Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. 449637 Ontario Inc., carrying on business under the name and style of Rivard Mechanical, Michel Rivard Plumbing Limited, carrying on business under the name and style of Rivard Plumbing, J. G. Rivard Limited, J. G. Rivard (Quebec) Limited, (Respondents). (*Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2741-80-R: The Employees of North American Fabricators Ltd. as represented by Maxime Robichaud (Applicant) v. United Steelworkers of America, (Respondent) v. North American Fabricators Ltd., (Intervener).

Unit: "all employees of North American Fabricators Ltd. in Aurora, save and except foremen, persons above the rank of foreman, office and sales staff." (18 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots		16
Number of spoiled ballots	1	
Number of ballots marked in favour of respondent	5	
Number of ballots marked against respondent	10	

0120-81-R: E. Herd, (Applicant) v. Christian Labour Association of Canada, (Respondent). (*Dismissed*).

0295-81-R: Otto's Deli Inc., (Applicant) v. Retail Clerks Union, Local 486, (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 54

2353-80-R: United Furniture Workers of America, AFL-CIO, (Applicant) v. Deluxe Upholstery Employees Association, (Respondent) v. La-Z-Boy Canada Limited, (Respondent).

Unit: "all employees of La-Z-Boy Canada Limited at Waterloo, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (120 employees in unit). (*Dismissed*).

Number of names of persons on revised voters' list		112
Number of persons who cast ballots		112
Number of ballots marked in favour of applicant	49	
Number of ballots marked in favour of respondent	63	

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0276-81-R: Brink's Canada Limited, (Applicant) v. Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and those persons listed on Schedule A, (Respondent). (*Withdrawn*).

APPLICATIONS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

0201-80-OH: United Steelworkers of America on behalf of the complainants listed in Appendix 1, (Complainant) v. Certified Brakes, A Lear Siegler Company, (Respondent). (*Withdrawn*).

2581-80-OH: United Electrical, Radio and Machine Workers of America (UE) and its Local 518, (Complainant) v. Prefab Cushioning Products Limited and Vitafoam Products Canada Limited, (Respondent). (*Withdrawn*).

0176-81-OH: Carl J. Murphy (Complainant) v. V.P. Heney, Industrial Project Manager, Chromasco Limited, (Respondent). (*Withdrawn*).

0191-81-OH: Service Employees Union, Local 204 (A.F. of L.; C.I.O.; C.L.C.), (Complainant) v. Northwestern General Hospital, (Respondent). (*Withdrawn*).

0210-81-OH: Dave Voortman, (Complainant) v. Energy Saving Canada, (Respondent). (*Dismissed*).

APPLICATIONS UNDER SECTION 39 (RELIGIOUS EXEMPTION)

0023-81-M: Dale W. McCann, (Applicant) v. International Union of Electrical, Radio & Machine Workers, AFL CIO CLC, and its Local 520, (Respondent Trade Union) v. International Systcoms Limited, (Respondent Employer). (*Granted*).

0100-81-M: William F. Morgan, (Applicant) v. Bakery, Confectionery and Tobacco Workers International Union Local Number 284: Mr. Don Szmon, (Respondent Trade Union) v. The Shaw Baking Company Limited, (Respondent Employer). (*Dismissed*).

0231-81-M: John F. Wallace, (Applicant) v. Local 124, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Respondent Trade Union) v. I.T.W. Canada Inc., (Respondent Employer). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0021-81-M: Work Wear Corporation of Canada Ltd. (Anchor Textiles Division), (Applicant) v. Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351, (Respondent). (*Granted*).

0068-81-M: Chester Drive-In Cleaners, (Applicant) v. Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351, (Respondent). (*Granted*).

0121-81-M: Oxford Picture Frame Co. Limited, (Applicant) v. International Union of Allied Novelty and Production Workers, OFL-CIO, Local 905, (Respondent). (*Granted*).

0260-81-M: Bristol-Myers Pharmaceutical Group, a Division of Bristol-Myers Canada Ltd., (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local 1538, (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 55

1751-80-R: United Food & Commercial Worker's International Union, Local 633, AFL-CIO-CLC, (Applicant) v. Vaunclair Meats Limited, (Respondent) v. Group of Employees, (Intervenors). (*Granted*).

2195-80-R: Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. 449637 Ontario Inc., carrying on business under the name and style of Rivard Mechanical, Michel Rivard Plumbing Limited, carrying on business under the name and style of Rivard Plumbing, J. G. Rivard Limited, J. G. Rivard (Quebec) Limited, (Respondent). (*Dismissed*).

2343-80-R: Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. 449637 Ontario Inc., carrying on business under the name and style of Rivard Mechanical, Michel rivard Plumbing Limited, carrying on business under the name and style of Rivard Plumbing, J. G. Rivard Limited, J. G. Rivard (Quebec) Limited), (Respondent). (*Dismissed*).

2780-80-R: The International Beverage Dispensers' and Bartenders' Union, Local 280, (Applicant) v. Cabbagetown Inn Limited, (Respondent). (*Granted*).

0033-81-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 637, (Applicant) v. Tri-Canada Ltd., (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 76 (FINANCIAL STATEMENT)

2587-80-M: Gerald Harvey, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1459, (Respondent). (*Terminated*).

0211-81-U: Ontario Public Service Employees Union, (Complainant) v. D. E. Light, L. Colgate, B. A. Ferrett, and George Brown College of Applied Arts and Technology, (Respondents). (*Withdrawn*).

JURISDICTIONAL DISPUTE

0045-81-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552 and International Brotherhood of Electrical Workers, Local 773, (Complainants) v. (1) International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (2) Wm. Roberts Electrical & Mechanical Ltd. and (3) Donald Stewart, (Respondents). (*Dismissed*).

APPLICATION UNDER THE COLLEGES COLLECTIVE BARGAINING ACT, (SECTION 78)

0033-81-U: Ontario Public Service Employees Union, (Complainant) v. The George Brown College of Applied Arts and Technology and Barbara A. Ferrett, (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

2370-79-U: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant/Complainant) v. Research Foods (1976) Limited, (Respondent) v. Group of Employees, (Objectors). (*Granted*).

1258-80-U: Pearl Geisbrecht, (Complainant) v. Dutch Treat Restaurant & Deli Inc., (Respondent). (*Granted*).

2040-80-U: United Steelworkers of America, (Complainant) v. Fotomat Canada Limited, (Respondent). (*Granted*).

2236-80-U: Canadian Union of Industrial Employees, (Complainant) v. Anderson Metal Industries, (Respondent). (*Withdrawn*).

2296-80-U: The International Association of Machinist and Aerospace Workers, (Complainant) v. Treco Machine & Tool Ltd., (Respondent). (*Granted*).

2418-80-U: Canadian Union of Industrial Employees, (Complainant) v. Anderson Metal Industries, (Respondent). (*Withdrawn*).

2518-80-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant/Complainant) v. A. Stork & Sons Ltd., (Respondent). (*Granted*).

2536-80-U: Ontario Public Service Employees Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondents). (*Granted*).

2537-80-U: Ontario Public Service Employees Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondents). (*Granted*).

2539-80-U: Stanley J. Dalton, R.N.A., (Complainant) v. Bloorview Childrens Hospital, (Respondent). (*Dismissed*).

2578-80-U: Ontario Public Service Employees Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondents). (*Granted*).

2579-80-U: United Steelworkers of America, (Complainant) v. Crawford Metal Corporation, (Respondent). (*Withdrawn*).

2599-80-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. L. E. Watson Building Supplies Co. Inc., (Respondent). (*Granted*).

2703-80-U: Ontario Nurses' Association, (Complainant) v. Women's College Hospital, (Respondent). (*Dismissed*).

2705-80-U: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Complainant) v. CTF Construction Ltd., (Respondent). (*Granted*).

2744-80-U: Food and Service Workers of Canada (formerly Canadian Food and Associated Services Union), (Applicant/Complainant) v. Zum Rudy's Foods Limited, (Respondent) v. Group of Employees, (Objectors). (*Withdrawn*).

2764-80-U: Frank Cassar, (Complainant) v. Amalgamated Transit Union, (Respondent). (*Withdrawn*).

2779-80-U: Le Droit Ltee, (Complainant) v. Jacques Charlebois, (Respondent). (*Withdrawn*).

2793-80-U: National Council of Canadian Labour, Local 215, (Complainant) v. Chateau Manufacturing Ltd., (Respondent). (*Withdrawn*).

2814-80-U: Food and Service Workers of Canada (formerly Canadian Food and Associated Services Union), (Applicant/Complainant) v. Zum Rudy's Foods Limited, (Respondent) v. Group of Employees, (Objectors). (*Withdrawn*).

0015-81-U: Brian Protheroe, (Complainant) v. Harding Carpets Ltd., (Respondent). (*Withdrawn*).

0024-81-U: United Cement, Lime and Gypsum Workers International Union, (Complainant) v. Plastics CMP Limited, (Respondent). (*Withdrawn*).

0034-81-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #637, (Complainant) v. Coulter Copper & Brass Limited and Arthur Anderson Inc. as interim receiver of Coulter Copper & Brass Limited, (Respondents). (*Granted*).

0059-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. City Bakery (Northern) Limited, (Respondent). (*Withdrawn*).

0060-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. City Bakery (Northern) Limited, (Respondent). (*Withdrawn*).

0086-81-U: United Steelworkers of America, (Complainant) v. Metropolitan Garage Doors Limited, (Respondent). (*Withdrawn*).

0128-81-U: Canadian Brotherhood of Railway Transport and General Workers, (Complainant) v. Canadian Mini-Warehouse Properties Limited, (Respondent). (*Withdrawn*).

0129-81-U: Food and Service Workers of Canada, (Complainant) v. Zum Rudy's Foods Limited, (Respondent). (*Withdrawn*).

0130-81-U: Food and Service Workers of Canada, (Complainant) v. Zum Rudy's Foods Limited, (Respondent). (*Withdrawn*).

0145-81-U: Clarence Kitchen, (Complainant) v. Retail, Wholesale, Bakery & Confectionery Workers Union, Local 461, (Respondent). (*Dismissed*).

0153-81-U: The International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Huron Industrial Insulation Limited, (Respondent). (*Granted*).

0154-81-U: Donna Cuitak, (Complainant) v. Larry Cooke, (Respondent). (*Withdrawn*).

0157-81-U: Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation No. 288 and John Oakes, (Respondents). (*Withdrawn*).

0158-81-U: Labourers' International Union of North America, Local 183, (Complaint) v. Impact Cleaning Services Limited and Clark Gilbert, (Respondent). (*Withdrawn*).

0166-81-U: Labourers' International Union of North America, Local 183, (Complainant) v. Belmont Property Management, (Respondent). (*Withdrawn*).

0175-81-U: Lee Ann Taylor and Randy St. Jacques Veteran Cab Union Rep. Windsor, (Complainant) v. Employer Mr. M. J. Oag, (Respondent). (*Withdrawn*).

0178-81-U: United Steelworkers of America, (Complainant) v. Wallace-Barnes Limited Associated Springs Division, (Respondent). (*Withdrawn*).

0181-81-U: The Amalgamated Clothing & Textile Workers Union, (Complainant) v. Trimarine Canada Limited, (Respondent). (*Withdrawn*).

0187-81-U: Betty Lavoie, (Complainant) v. Office and Professional Employees International Union, Local 343, (Respondent) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Intervener). (*Withdrawn*).

0189-81-U: William Dunlop, (Complainant) v. United Steelworkers of America Local Union No. 1005, (Respondent). (*Withdrawn*).

0203-81-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. HDM Transformers Co. Ltd., (Respondent). (*Withdrawn*).

0208-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Min-A-Mart Limited Operated by Mr. John Evaniss, (Respondent). (*Withdrawn*).

0219-81-U: William Lasky, (Complainant) v. William Hardy, (Respondent). (*Withdrawn*).

0272-81-U: David Dadd, John Dennis, James Porter and Don Findlay, (Complainants) v. William Daley, Robert Bradley, and The Peel Board of Education Custodian and Maintenance Employees Association, (Respondents). (*Withdrawn*).

0324-81-U: Eugenio Da Rosa, (Complainant) v. United Food & Commercial Workers Int'l Union, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1030-80-M: Westmount Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Granted*).

2830-81-M: The Regional Municipality of Haldimand-Norfolk, (Employer) v. Canadian Union of Public Employees and its Local 2210, (Trade Union). (*Withdrawn*).

APPLICATIONS UNDER SECTION 112a

1939-78-M: United Brotherhood of Carpenters and Joiners of America Local 1988, (Applicant) v. Canadian Bechtel Limited, (Respondent). (*Withdrawn*).

1923-79-M: Mechanical Contractors Association Ottawa and Mechanical Contractors Association Ontario, (Applicants) v. J. G. Rivard Limited and Michel Rivard Plumbing Limited, (Respondents). (*Granted*).

1005-80-M: Labourers' International Union of North America, Local 491, (Applicant) v. Betteridge Construction (Timmins) Ltd., (Respondent). (*Withdrawn*).

1955-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Cliffside Pipelayers Limited and The Pipe Line Contractors Association of Canada, (Respondents). (*Dismissed*).

1975-80-M: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. J.D.S. Investments Limited and Martin Ross Construction Ltd., (Respondents). (*Withdrawn*).

2056-80-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Bre-Ex Limited, (Respondent). (*Granted*).

2140-80-M: Labourers' International Union of North America — Local 183, (Applicant) v. Dundas-Scarlett Developments Limited, (Respondent). (*Granted*).

2766-80-M: Toronto-Central Ontario Building and Construction Trades Council, Sheet Metal Workers' International Association, Local Union No. 30, International Brotherhood of Electrical Workers, Local 353, International Brotherhood of Teamsters, Warehousemen, Chauffeurs and Helpers, Local Union 230 and International Union of Operating Engineers, Local 793, (Applicants) v. W.A. Stephenson Construction Company Limited, (Respondent). (*Granted*).

2842-80-M: United Food and Commercial Workers International Union, (Complaint) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

2843-80-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

2844-80-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

2845-80-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

2846-80-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondent). (*Withdrawn*).

2847-80-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

2848-80-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

2849-80-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

2850-80-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

0014-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Ranfas Engineering and Construction Limited, (Respondent). (*Granted*).

0022-81-M: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Len Thurston Limited and John Thurston Machine Limited, (Respondents). (*Withdrawn*).

0053-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Beaver Construction (Ont.) Ltd., (Respondent). (*Withdrawn*).

0054-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Contech Mechanical Contractors Limited, (Respondent). (*Granted*).

0058-81-M: Labourers' International Union of North America, (Applicant) v. Nick Giamberardino & Bros. Ltd., (Respondent). (*Withdrawn*).

0124-81-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. J. C. Moag Company Ltd., (Respondent). (*Granted*).

0125-81-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Candesco (1978) Ltd., (Respondent). (*Granted*).

0146-81-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 721, (Applicant) v. Metric Steek Limited, (Respondent). (*Granted*).

0149-81-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

0150-81-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

0151-81-U: United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home Ltd., and Patricia Ing, (Respondents). (*Withdrawn*).

0180-80-M: International Union of Operating Engineers, Local 793, (Applicant) v. State Electric Co. Ltd., (Respondent). (*Withdrawn*).

0209-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. All Can Plumbing & Heating Co. Ltd., (Respondent). (*Granted*).

0242-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. L.J.S. Construction Limited, (Respondent). (*Granted*).

0265-81-M: The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

0317-81-M: Resilient Floor Workers' Local 2965, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Perfection Rug Company, (Respondent). (*Withdrawn*).

0334-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Muzzo Brothers Limited, carrying on business under the firm name and style of Marel Contractors, (Respondent). (*Granted*).

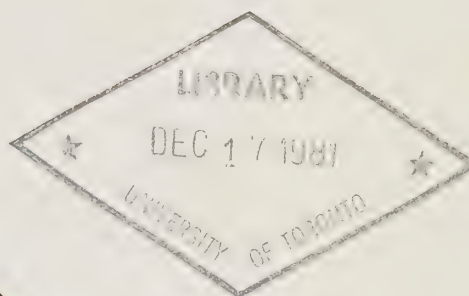
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2196-80-M: Richard L J. Lizotte, (Applicant) v. Service Employees Union Local 210, affiliated with Service Employees International Union, AFL-CIO-CLC, (Respondent Trade Union) v. Chatham and District Ambulance Service, (Respondent Employer). (*Dismissed*).

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2837-80-U Alexander Barna, Complainant, v. The Canadian Brotherhood of Railway, Transport and General Workers and its Local 271, Respondents.

Duty of Fair Representation – Union treating members and non-members differently in considering their grievances – Relying on Union’s constitution – Whether arbitrary

BEFORE: R. A. Furness, Vice-Chairman.

APPEARANCES: *Desmond E. McGarry and Alexander Barna for the complainant; F. C. Johnston and Rick Beckwith for the respondents; and G. L. Poppe for CN Tower Restaurants Ltd.*

DECISION OF THE BOARD;

1. The name of the respondents appearing in the style of cause of this application as “CBRT & GW Local 271” is amended to read “The Canadian Brotherhood of Railway, Transport and General Workers and its Local 271”.

2. The complainant has complained that he has been dealt with by the respondents contrary to the provisions of section 60 of *The Labour Relations Act*.

3. The facts which give rise to this complaint are not in dispute. The complainant was employed by CN Tower Restaurants Ltd. (the “employer”) as a bartender on a full-time basis for one year and prior to that time on a part-time basis for four months. As an employee of the employer he was a member of the respondent. On December 2, 1980, the complainant was investigated with regard to allegations of theft and improprieties in bar procedure at the Sparkles Discotheque where he was employed. The investigation was conducted on December 2, 1980, with the complainant, representatives of the respondent and representatives of the employer’s management. A transcript of this interview was made and was filed with the Board.

4. As a result of this interview, the complainant was discharged from his employment on December 2, 1980. The complainant grieved this discharge and his grievance was filed at the first level under the collective agreement between the Canadian Brotherhood of Railway, Transport and General Workers and the employer. The collective agreement became effective on June 1, 1979, and expires on May 30, 1982. On December 17, 1980, a reply which denied the grievance was received from the employer. The Canadian Brotherhood of Railway, Transport and General Workers then filed a step two grievance in a letter dated December 30, 1980. This letter was signed by Mike Sgambelluri, the chairman of Local 271. This step two grievance was denied by the employer in a letter dated January 14, 1981, from its general manager, David E. Garrick, to Mr. Sgambelluri.

5. Mr. Sgambelluri, in a letter to the employer dated January 29, 1981, appealed the grievance to the third step. In a letter dated February 12, 1981 from the employer’s assistant general manager to Rick Beckwith, who is described as the accredited representative of the Canadian Brotherhood of Railway, Transport and General Workers, Local 271, the employer again denied the grievance. The complainant, notwithstanding the position of the employer in its letter dated February 12, 1981, asked the respondent to take his grievance to arbitration. In a letter to the complainant dated February 24, 1981, Mr. Beckwith wrote as follows:

Dear Alex:

Re: Discharge for misuse of Computer Bar System, Sparkles

I have had an opportunity to review the files pertaining to your case leading up to your discharge from the C N Tower.

Your grievance was processed through the grievance procedure and we were unable to obtain a satisfactory adjustment. We are now faced with the decision to proceed to arbitration or not.

As I pointed out at our meeting the facts are very clear and the evidence adduced at the investigation clearly implicates you with wrong-doing during the course of your duties on the days in question.

In view of this it is my decision on behalf of the Regional Vice President not to proceed to arbitration with your case.

You may appeal this decision under the Constitution of the Brotherhood, Article 17, clause I & J. If you wish to appeal, please advise so that we can protect the time limits as per the Collective Agreement.

Yours truly
Rick Beckwith
Representative

6. On February 24, 1981, the complainant sent a wire to the employer's assistant general manager requesting an extension of the time limits to April 15 on the discharge cases of Messrs. Barna and Bakker regarding article 16.5 of the collective agreement. The Board notes that the topic of the grievance of Mr. Bakker has not been raised before the Board in this proceeding. The complainant then sent the following letter which is dated March 3, 1981, to the national president and which states:

Brother D. Nicholson
National President
CBRT and GW
2300 Carling Avenue,
Ottawa, Ontario
K2B 7G1

Dear Brother Nicholson:

This is to appeal the decision of the Regional Vice President, with respect to my discharge from the C N Tower, Toronto, Ontario.

I am enclosing all pertinent documents to my case and would appreciate you advising the arrangements for the hearing.

Your truly
Alex Barna
Encls.

Mr. Beckwith drafted this letter for the complainant.

7. The national president sent the following letter to the national vice-president and copies of this letter were received by the complainant and Messrs. Beckwith and Johnston. This letter is dated March 11, 1981, and states:

Appeal: A-603

Mr. J. D. Hunter
National Vice President
C.B.R.T. & G.W.
2300 Carling Avenue
Ottawa, Ontario
K2B 7G1

Dear Brother Hunter:

Re: Appeal — Brother A Barna — Local 271

In accordance with the appropriate provisions of the Constitution, this is to refer to the National Appeals Committee an appeal of Brother A. Barna against a decision of Brother F. C. Johnston.

My records indicate the date the decision being appealed was made on February 24th, 1981. The date of the appeal was March 3rd, 1981. The constitutional time limits have been observed, and the appeal is otherwise in order under Article 17, Section J, of the Constitution.

I am enclosing copy of the file concerning this matter, and I presume if any additional documentation may be required, this can be obtained through contacting either the Regional Office or Brother Barna.

It would be appreciated if you would give this matter your usual prompt attention.

With best wishes,

Yours fraternally,

Don Nicholson
National President
JAM: jc

cc: F.C. Johnston
R. Beckwith
A. Barna
Attach.

Attached to this letter was the following letter also dated March 11, 1981, which states:

Dear Brother Barna:

Re: Appeal — Brother A. Barna — Local 271

This is to advise that your appeal against the decision of Brother F. C. Johnston, dated March 3rd, 1981, and received here on March 9th, 1981, has been referred to Brother J. D. Hunter for further processing by the National Appeal Committee. Copy of my correspondence to Brother Hunter in this respect has been directed to you.

It is the normal practice of the Chairman of the Appeals Committee to provide as much advance notice as possible concerning dates of meetings of the Committee to those who might wish to appear before the Committee. I have no doubt this will be done when your case is scheduled.

With best wishes,

Yours fraternally,

Don Nicholson
National President

JAM: jc

cc: J. D. Hunter
F. C. Johnston
R. Beckwith
Attach.

8. On March 16, 1981, the following letter was sent to the complainant:

Dear Mr. Barna:

This is further to your letter of March 3rd, 1981, to the National President and his reply of March 11th concerning your Appeal on the decision reached by F. C. Johnston not to process your grievance to arbitration.

In his letter to the Chairman of the Appeals Committee, copy to you, Mr. Nicholson stated that the appeal was constitutionally in order under the provisions of Article 17, Section J, as it was assumed that you were a member in good standing on the date that the Appeal was filed.

The aforementioned Article stipulates that only a Local or a member may appeal, and it is now noted on the National Office records that, having not paid dues for the months of December, January or February, you were dropped from membership on March 1st. This provision is covered in Article 5, Section D.

As you therefore were considered to be non-member on the date of the

Appeal, it is with regret that you must be advised that your Appeal is denied.

Yours very truly,

J. A. Mollins
Executive Assistant

JAM/lm

cc: J. D. Hunter, National Vice President
F. C. Johnston, Regional Vice President
R. Beckwith, Representative

9. The complainant, during his period of employment, paid his union dues by way of payroll deduction. At no time during the period from December 2, 1980, until March 16, 1981, was the complainant informed that he would be required to make other arrangements as to the payment of dues in order to retain his membership in the respondent and to protect his right to appeal under the constitution.

10. It was the complainant's position that the respondents have acted in an arbitrary manner on March 16, 1981, when they indicated that they would not hear his appeal. The complainant has no quarrel with the respondent's decision (whether right or wrong) not to proceed to arbitration as set out in Mr. Beckwith's letter dated February 24, 1981, within the terms of section 60. The complainant conceded that such a decision was not made in a manner that was arbitrary, discriminatory or in bad faith. However, the complainant adopted the position that the decision of the Canadian Brotherhood of Railway, Transport and General Workers was arbitrary because prior to his discharge he had been an employee of the employer and a member of that trade union with his monthly dues being deducted from his paycheque. The complainant argued that the reason for the non-payment of dues was the absence of a pay cheque with the consequent absence of a deduction with respect to dues. The complainant stressed that at no time was he informed that he would not have to pay membership dues when his employment was terminated. The complainant characterized the refusal to entertain the appeal as a refusal to consider the merits of the grievance and the facts surrounding his situation. The reliance on a technicality in the constitution was viewed as denying the complainant his right to have his grievance dealt with properly.

11. The complainant conceded that it was quite possible that the National Appeals Committee would have decided not to proceed to arbitration and that if it had done so the complainant would have no complaint under section 60. It was stressed that by not allowing representations to the National Appeals Committee, the respondents had effectively denied the complainant the right to arbitration. The complainant stated that while he was not alleging discriminatory conduct there was potentially bad faith in the behaviour of the respondents in representing him.

12. The respondents argued that they had very carefully monitored the grievance as it progressed through the three steps and that they were governed by the internal appeal procedures set forth in the constitution. It was the view of respondents that the decision to deny the appeal was properly made having regard to the provisions of article 5, section D of the constitution. The respondents stressed that neither Mr. Beckwith nor Mr. Johnston, the

Regional Vice-President, knew that the complainant had ceased to be a member. The respondents argued that their conduct in representing the complainant was neither arbitrary, discriminatory or in bad faith because the steps taken in representing the complainant were conducted in conformity with the constitution. Mr. Johnston informed the Board that in order to be a member it was necessary for a person to be employed by an employer which has a collective agreement with the respondents and that there was no provision in the constitution for the maintenance of membership other than during such an employment relationship.

13. The employer adopted a neutral position in the complaint and expressed the view that since the act complained of was a refusal to have the National Appeals Committee hear the appeal the appropriate remedy, in the event that the complainant succeeded, would be to order the appeal to be heard by the National Appeals Committee rather than ordering that the grievance be taken to arbitration.

14. In reply, the complainant pointed out that if an employment relationship was necessary in order to be a member then discharged employees would automatically lose their membership. The complainant argued that article 5, section D of the constitution would mean that where an employee is discharged and the grievance process takes more than three months then the loss of membership would automatically mean that there would be no right to appeal to the National Appeals Committee.

15. Article 5, section D of the constitution states:

Dues shall be payable monthly. Except as hereinafter provided, a member three (3) months in arrears in the payment of dues to his local, according to the membership records at the National Office, shall be dropped from membership. A member whose employment is seasonal in nature may have his dues waived for a period not exceeding nine (9) months, upon the adoption of a by-law to this effect by the local, approved by the National President. Except where a dispensation has been granted or dues waived, a member to whom a withdrawal card has been issued must, when applying for re-admittance, pay a re-entrance fee together with any assessment due at the time of his suspension or that was levied during the three (3) months immediately preceding his application for re-admission, and he shall be voted on in the same manner as a new applicant. A member on approved leave of absence, account of sickness, shall not be dropped from membership.

Article 17, section J of the constitution states:

Appeals

- 1) When a ruling or a decision of a National or Regional Vice President, or of a member authorized to act on his behalf or of any other office or member whose ruling or decision on collective agreement matters is not otherwise subject to appeal, is protested by a member or by a local, the member or the local may, within sixty (60) days from the date the ruling or decision was given, file an appeal with the National President and shall at the same time,

submit to him a full statement of facts and the original or true copies of all correspondence and other documents in connection with the appeal. Copy of such appeal shall be submitted to the National or Regional Vice President whose ruling or decision is being appealed. The National President shall refer the appeal to the members of the Appeals Committee for consideration and their decision on the appeal shall be final. The Appeals Committee will advise the appellant of the reasons for its decision within one (1) week. All members of the Appeals Committee shall receive a full statement of the facts relating to the appeal.

- 2) A member of an Appeals Committee whose ruling or decision is being appealed, shall absent himself from the meeting during the hearing, but may be required to appear for questioning on decision of the majority of the Committee; the member of the Committee whose ruling or decision is being appealed shall not be allowed to vote on the decision. When the Appeals Committee is dealing with an appeal, the member or local that submitted the appeal shall, upon written request, be allowed to appear before the Committee, or to be represented before the Committee by a member under the jurisdiction of the Committee, to support the appeal. Should the appeal be sustained, the appellant shall be paid for such out-of-pocket expenses as may have been incurred together with any wages or salary that may have been lost in consequence thereof, and the National Vice President shall endeavour to settle the case of the earliest possible date.
- 3) In the event that an appeal is upheld but the time limits in the grievance procedure have expired, the grievance shall be considered settled and the Brotherhood shall pay any loss or wages, or if the grievance is refused by the company because the organization, at the National or Regional Vice President's level, has not processed the grievance within the prescribed time limits, the grievance shall be considered as won and the Brotherhood shall pay any claim if wages were involved, providing the member has complied with the provisions of Article 17, Section I.

Section 60 of the Act provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

16. Section 60 imposes a duty of fair representation on a trade union and requires that a trade union so long as it continues to be entitled to represent employees in a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith. In addition, this duty of fair representation is required whether or not members of the trade union in question. The

Board has analysed on several occasions the meaning to be given to the words “arbitrary”, “discriminatory” and “bad faith” in section 60. In this regard see *Canadian Union of Public Employees, Local 1000 — Ontario Hydro Employees Union*, [1975] OLRB Rep. May 444. In that case, the Board concluded that “discriminatory” and “bad faith” described conduct in a subjective sense — that an employee ought not to be the victim of the ill-will or hostility of trade union officials or of a majority of the members of the trade union. In that same case, the Board reasoned that “arbitrary” was to be given an independent meaning beyond subjective ill-will while acknowledging that the meaning to be ascribed to “arbitrary” lacked any precise parameters.

17. In the instant complaint the respondents pressed the complainant’s grievance as far as the third step of the grievance procedure. At this point a decision was made not to proceed to arbitration. When the complainant indicated his desire to proceed to arbitration, the respondents informed him that a decision had been made not to proceed to arbitration. At that point, Mr. Beckwith drafted the letter which was sent to the National President. The complainant’s appeal was denied for the reasons set forth in the letter dated March 16, 1981.

18. This complaint raises the question of whether the complainant may be denied an appeal with respect to the disposition of his grievance where he was dropped from membership under the provisions of the constitution. Moreover, it appears from the representations of Mr. Johnston that membership in the respondents would be lost in any event upon the complainant ceasing to be an employee of the employer and that there is no provision in the constitution for the complainant to maintain his membership upon ceasing to be employed by an employer which has a collective agreement with the respondents. The constitution forms a contract between a member and his trade union, see *Orchard v. Tunney* (1957), 8 D.L.R. (2d) 273, and the constitution is binding on each member. However, while constitution governs the internal affairs of a trade union, a trade union may not by virtue of the provisions of its constitution contract out of the provisions of *The Labour Relations Act*. Section 60 requires a duty of fair representation of employees whether or not they are members of a trade union. Since the stated reason for denying the appeal to the National Appeals Committee were based upon the fact that the complainant was dropped from membership, the question arises whether such a denial is arbitrary, discriminatory or in bad faith.

19. In *Canadian Union of Public Employees Local 1000 — Ontario Hydro Employees Union, supra*, the Board concluded that “discriminatory” and “bad faith”, as used in section 60, described conduct in a subjective sense — that an employee ought not to be the victim of the ill-will or hostility of trade union officials or of a majority of the members of the trade union. The complainant received support from Mr. Sgambelluri and Mr. Beckwith and, initially, at least, from the National President. On the facts before it the Board is not prepared to find that the complainant was the victim of ill-will or hostility by the respondents, its officials or its members. The complainant was not denied an appeal for reasons that were either discriminatory or in bad faith in the sense of his being singled out for special treatment. The complainant was denied his appeal because of the provisions of article 5, section D, of the constitution which in the context of this complaint have the effect of abandoning the complainant when he lost his job and subsequently was dropped from membership.

20. The conduct of the respondents in denying the complainant’s appeal was arbitrary within the meaning of section 60 because the respondents invoked provisions in the constitution in order to treat a non-member differently from a member. The provisions of

article 17, section J, are discriminatory in general terms for the purposes of the duty of fair representation under section 60 because different treatment is provided for members and non-members. Such treatment is in itself contrary to the provisions of section 60. In applying the provisions of article 17, section J to the complaint, the respondents have behaved in an arbitrary manner towards him.

21. The respondents are directed to entertain forthwith the complainant's appeal before the National Appeals Committee. In entertaining the complainant's appeal, the National Appeals Committee is required to direct their minds to the merits of the complainant's grievance. It is particularly necessary that the National Appeals Committee direct their minds to the merits of the complainant's grievance where the circumstances surrounding his discharge involve an allegation of theft. Such an allegation leaves a terrible stigma on a person's record and the appeal therefore requires the fullest possible consideration by the National Appeals Committee.

22. In the circumstances of this complaint, the Board retains jurisdiction in order to consider any issues which may arise with respect to this decision.

0013-81-U Ontario Service Employees Union, Complainant v. Alpha Laboratories Inc., Respondent.

Discharge for Union Activity – Employer alleging just cause for dismissal – Discharge occurring after union losing representation vote – Anti-union motivation established

BEFORE: R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and W. F. Rutherford.

APPEARANCES: *Chris G. Paliare, L. Rothstein and Pauline Seville for the applicant; B. N. Midanik and C. J. Kurian for the respondent.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD;

1. This is a complaint under section 79 of *The Labour Relations Act* in which the complainant alleges that the grievors, Clement Zinally and Sanjay Tarachandra, were discharged by the respondent in contravention of sections 3, 56, 58 and 61 of the Act. The complainant further alleges that the respondent contravened section 70 of the Act by failing to increase Mr. Zinally's salary effective February 16, 1981.

2. Section 79(4a) of the Act provides:

“On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of

employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization."

Accordingly, in this case the burden of proof is on the respondent to establish on the balance of probabilities that it did not act contrary to the Act in discharging the grievors.

3. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

"... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred".

It is not the function of the Board in the present case to decide whether or not the respondent had just cause to discharge the grievors. Our jurisdiction is limited to determining whether the respondent discharged the grievors because they were supporters of the complainant trade union or were exercising any other rights under the Act (see *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582, paragraph 11). This does not, however, preclude the Board from considering the context surrounding the respondent's actions, as indicated by the Board in *Fielding Lumber Company* [1975] OLRB Rep. Sept. 665, at paragraph 19:

"The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* — a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it."

The nature of the determination to be made in cases such as the instant case and the factors to be considered by the Board in making such determinations are described as follows in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

"In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other 'peculiarities'. (See *National Automatic Vending Co. Ltd.* 63 CLLC 16, 278)"

With those general principles in mind, the Board must now consider the facts of the present case.

4. The respondent has operated a private laboratory since July of 1971. Dr. Joseph Kurian, the President of the respondent, oversees the operation of the laboratory, which includes an industrial section, a research section, and a medical section. The medical section is further divided into a number of subsections, including bacteriology, haematology, citology, chemistry and immunohaematology. The respondent employs a total of approximately 25 persons.

5. Mr. Zinally commenced employment with the respondent on February 16, 1979 as a microbiology technologist. His starting salary of \$950 per month was raised to \$1,000 per month at the end of his three month probationary period. After one year of employment, his annual salary was increased by \$1,000 to \$13,000.

6. Dr. Mohammed Karmali, a highly qualified medical microbiologist, became a part-time director of microbiology for the respondent in August of 1980. In performing the duties of his position, Dr. Karmali attended at the respondent's laboratory once or twice a week. By September, Dr. Karmali had become aware that Mr. Zinally was not following some of the procedures set forth in the lab manual. Dr. Karmali immediately advised Dr. Kurian of this fact and "continued to tell him (Dr. Kurian) everytime he (Dr. Karmali) recognized that Mr. Zinally was not using proper procedures"; it was Dr. Karmali's evidence that this happened "several times". Dr. Kurian stated during cross-examination that Dr. Karmali complained to him from September onward "about once or twice a month". He further testified that Dr. Karmali told him "around December" that Mr. Zinally was not following his (Dr. Karmali's) instructions. Dr. Kurian testified that Mr. Zinally's failure to follow Dr. Karmali's instructions was one of the most important reasons for the discharge of Mr. Zinally. However, it is clear from the evidence that Dr. Kurian took no disciplinary action against Mr. Karmali on the basis of those criticisms at the time, apart from speaking to Mr. Zinally in December about the need to follow Dr. Karmali's instructions. It appears that Dr. Kurian's general response to Dr. Karmali was that "Mr. Zinally was a loyal person". Dr. Karmali confirmed that "Dr. Kurian had always spoken well of Mr. Zinally."

7. In addition to Dr. Karmali's complaints, Dr. Kurian also received complaints about Mr. Zinally in the fall of 1980 from a citology technologist who complained that Mr. Zinally continually switched the radio in the lab from soft music to rock and raised the volume. Another lab employee also complained to Dr. Kurian in October or November that Mr. Zinally had been insulting her in front of other people and throwing books at her.

8. Dr. Kurian also referred to a number of other incidents involving Mr. Zinally in support of his contention that Mr. Zinally was discharged because he was not a satisfactory employee, such as failing to promptly obtain a replacement for a broken part in one of the machines in the lab and handling ether close to an open flame. However, many of those incidents occurred long before Mr. Zinally's discharge and each of them appears to have been either condoned by Dr. Kurian or viewed by him to be not terribly significant since no disciplinary action was taken in relation to any of them.

9. Dr. Kurian also testified that Mr. Zinally's attitude toward him during his last few months of employment was "very arrogant" and "insulting". He told the Board:

"I used to ask [Mr. Zinally] how is the work but [after notice of the certification application was received] he told me: 'You go and check with the secretary. She is keeping the records.' Under normal circumstances I would have fired him on the spot. I didn't do it because my lawyer told me not to do anything until the union problem was finished."

Dr. Kurian testified that he was told that on the day of the certification vote, Mr. Zinally "almost became involved in a fist fight in the lab with another employee", after which Mr. Zinally "went around kicking all the boxes of reagents".

10. Dr. Kurian told the Board that he was not aware of any problems with Mr. Zinally's technical qualifications "in the beginning" but that "after Dr. Kamali joined, he (Dr. Karmali) was doubtful of his (Mr. Zinally's) technical ability." However, it appears from the evidence that Dr. Kurian was aware within a week after Mr. Zinally was hired that he was not a registered technologist ("R.T.") as required by Regulation 483/72 (made under *The Public Health Act*) which governs the respondent's operations. Dr. Kurian advised Mr. Zinally that he would have to take the R. T. examination when it was next held in June of 1979. Although Mr. Zinally advised Dr. Kurian that he did not pass the examination in June of 1979, Dr. Kurian took no action to discharge or demote him. Although Dr. Kurian attempted to give the Board the impression that he had been very concerned for several years about Mr. Zinally's lack of proper qualifications, the Board is of the view that in reality, Dr. Kurian was, until January of 1981, rather indifferent concerning Mr. Zinally's lack of proper qualifications as demonstrated by the fact that he was unaware of whether Mr. Zinally had even written the R.T. examination again at its next sitting in June of 1980, much less passed it.

11. Mr. Tarachandra commenced employment with the respondent on October 6, 1980 as its chief technologist. In that position he supervised all of the subsections of the medical section except bacteriology. At the time of hire, Dr. Kurian told Mr. Tarachandra that Mr. Zinally was an excellent worker who would be a valuable asset to him in getting settled into his new position and in assisting in the handling of any problems that might come up. It was also Mr. Tarachandra's evidence that from that time to the time that Dr. Kurian received notice of the complainant's application for certification on January 30, 1981, Dr. Kurian "had nothing but praise for Mr. Zinally and his performance".

12. After carefully reviewing his testimony and having regard to such factors as the consistency of his evidence, the firmness of his memory, his ability to resist the influence of interest to modify his recollections, his capacity to express his recollections clearly, and his demeanour while testifying, the Board has concluded that Dr. Kurian was not a reliable witness. Since we found Mr. Tarachandra to be more candid and credible than Dr. Kurian, in making our findings of fact in this case we have accepted the testimony of the former and rejected the testimony of the latter where their evidence is in conflict.

13. In October of 1980, Mr. Zinally's annual salary was increased by \$1,000 to \$14,000 per year to keep his salary in line with that received by some newly hired staff. Dr. Kurian initially testified that Mr. Zinally was told at that point that there would not be any increase on his anniversary date (February 16, 1981) in view of the October increase. However, he subsequently testified that when Mr. Zinally approached him on February 10, 1981 and asked him when he was going to review his salary and his work performance, he (Dr. Kurian) told

him that he “would look at that when the union thing is settled.” When confronted in cross-examination with the apparent inconsistency between those portions of the testimony, Dr. Kurian attempted to change his answer by stating, quite unconvincingly, that he had said that the review was to be of Mr. Zinally’s performance, not his salary. Dr. Kurian’s evidence is further contradicted by the credible testimony of Mr. Tarachandra who advised the Board that prior to January 30, 1981, Dr. Kurian asked him what increase he thought should be given to Mr. Zinally on his anniversary date of employment. As a result of that discussion, Dr. Kurian decided that Mr. Zinally would be given an increase of \$900 per year, effective February 16, 1981.

14. On January 21 and 22, 1981, two inspectors from the Laboratory Services Branch of the Ontario Ministry of Health inspected the respondent’s laboratory and “noted a number of adverse observations”. Dr. Kurian received a verbal report concerning those observations immediately after the inspection. This was followed by a detailed written report which was appended to a letter dated February 4, 1981, in which Mr. Gideon P. van Zyl, the Senior Inspector with the Branch’s Laboratory and Specimen Collection Centre Inspection Service, requested that Dr. Kurian initiate immediate corrective action to ensure that each of the “observations” noted in the appendix (hereinafter referred to as the “Report”) was remedied. Included in the observations noted in the Report was the following observation under the heading, “Staffing”:

“2. One member of staff was performing the duties of ‘technologist’ but did not meet the requirements of Ontario Regulation 483/72 made under the Public Health Act, i.e. C. Zinally.”

Dr. Kurian’s testimony during examination in chief concerning that “observation” was:

“If we continued to keep Mr. Zinally we were in danger of losing our licence. There was a follow-up inspection to see if we were complying. We assured them as soon as the union problem is resolved, we’ll replace Mr. Zinally with a qualified person.”

Dr. Kurian told the Board that he discharged Mr. Zinally on March 22, 1981 rather than demoting him because “there was no other job that was available”. Thus, Dr. Kurian attempted to give the Board the impression that the report left him with no alternative but to discharge Mr. Zinally. However, the report also contained the following observation concerning “Staffing”:

“3. There do not appear to be sufficient numbers of staff to handle the work load in Chemistry or Bacteriology/Serology, i.e. Chemistry handles approximately 150-160 tests per day – excluding RIA and Urinalysis; Bacteriology/Serology handles 30-40 Bacteriology tests and 18-20 Serology tests per day.”

15. In marked contrast with his willingness to “replace” Mr. Zinally in order to remedy observation #2, Dr. Kurian refused to take any steps to remedy observation #3. He responded to that observation by disputing the Ministry’s statistics (which were based upon an actual count by the inspectors, of the number of tests coming into the lab on a daily basis) and by expressing the view that the workload in Chemistry and Bacteriology/Serology was “well

within the capabilities of a single technologist". Thus, Dr. Kurian relied upon the Report only insofar as it suited his purposes. The testimony of Mr. van Zyl, who was subpoenaed to testify by the complainant, provides considerable insight into the manner in which Dr. Kurian normally responded to adverse observations by the Ministry. Mr. van Zyl testified that the Ministry has had more problems with, and put more work into the respondent's lab, than is normal for most labs. He produced a chronological report of inspection observations which indicated that a substantial number of adverse observations had been made during the period from December of 1973 to February of 1981. He told the Board: "Our experience [with the respondent] has been that adverse observations made by one inspector tend to be corrected for a short period of time. A year later we find them back the way they were in our initial finding." Mr. van Zyl also testified that if all of the other adverse observations in the Report had been corrected but Mr. Zinally had continued to work as a technologist, it would have been cancelled. He further testified that there was "no reason for the other matters not to be cleared up" as it would "not be difficult" for the respondent to do so. He also made it clear that the Ministry had suggested not that Mr. Zinally be terminated, but merely that he "be downgraded from a technologist"; Dr. van Zyl told the Board: "What we were looking for was for a qualified person to be brought in and an assistant to be provided to help him in that department." He also testified that Dr. Kurian's response (of challenging the statistics) had not changed his view that assistance is required for the technologist in that department. He advised the Board that after discussions with the new technologist (who replaced Mr. Zinally) and an examination of his workload, he is "still of the opinion that assistance is required for that person in that department." Accordingly, if it had actually been Dr. Kurian's intent to comply with the Report, he would have hired a qualified technologist and retained Mr. Zinally to assist that new person, instead of discharging him.

16. Following the January 21 and 22 inspection, Dr. Karmali met with Dr. Kurian and offered his resignation. He explained the reasons for his actions as follows:

"My practice of microbiology has been in a hospital. This was my first time with a private lab. To be quite frank, I didn't know if I was prepared to take the headaches that a private lab involves. In a hospital context, one is daily in the lab and can daily supervise. As a part time director, one has to rely to a great extent on the technologist. You need somebody who is innovative, able to make changes."

(Dr. Kurian managed to persuade Dr. Karmali to continue as a director on an interim basis.) Thus, Mr. Zinally's inability or unwillingness to follow Dr. Karmali's instructions was clearly one of the reasons that Dr. Karmali offered his resignation. However, Dr. Kurian continued to employ Mr. Zinally despite Dr. Karmali's dissatisfaction with him.

17. Dr. Kurian was bedridden with influenza from January 26 to January 29, 1981, inclusive. He returned to work on Friday, January 30. At approximately 10:30 that morning, before opening his mail, Dr. Kurian advised Mr. Tarachandra that he had decided to give him a \$40 a week raise, retroactive to January 1, since he was very satisfied with his performance. Although Dr. Kurian testified that he had been considering the termination of Mr. Tarachandra's employment, he acknowledged that he "tried to accent the positive" when he announced the raise. After Mr. Tarachandra had left his office, Dr. Kurian opened the envelope from the Board, which contained the notice of the complainant's application for certification and related documents. Dr. Kurian then telephoned Mr. Tarachandra and asked

him to come back to his office. When Mr. Tarachandra returned to Dr. Kurian's office he found him to be "very upset". Dr. Kurian told Mr. Tarachandra that he had "received an application from some union for certification". Dr. Kurian also told him that Mr. Zinally "started it and knew when it would be filed and chose the time for his vacation" so that he would not be at work when the papers arrived. Dr. Kurian informed Mr. Tarachandra that Susan Atenza, another employee in the medical section, was the other person that he was "sure" was involved in the union application. Dr. Kurian then told Mr. Tarachandra to "fire" both of them. Mr. Tarachandra responded that he would not be able to do so because they were good workers. Mr. Tarachandra also told Dr. Kurian that he had "read in the newspaper that employers have gotten themselves in trouble for harassing and dismissing employees and that [he] would have no part in the dismissal of any employees at Alpha." Dr. Kurian also indicated at that time that he was "going to call his lawyer". Later that day, Mr. Tarachandra was requested by Harvey Waterman, the Chief Chemist of the industrial section, to be part of an anti-union movement that would involve the signing of petitions. Mr. Tarachandra indicated that he would not do so. Having regard to all of the circumstances, it is reasonable to infer that this refusal came to the attention of Dr. Kurian.

18. It was Dr. Karmali's evidence that Dr. Kurian told him in late January or early February that "certain technologists in the medical lab were trying to form a union." Dr. Karmali further testified: "It [the union] concerned Dr. Kurian immensely. It was of great concern to him." It was also his evidence that Dr. Kurian indicated that Mr. Zinally and Mr. Tarachandra were union supporters. Although Dr. Kurian testified that he could not recall having any conversation with Dr. Karmali concerning the union and its supporters, we accept Dr. Karmali's candid and credible testimony concerning that matter without hesitation.

19. It can reasonably be inferred from the evidence that Dr. Kurian's opinion that Mr. Zinally was a union supporter was confirmed in his mind by the fact that Mr. Zinally was away on vacation when the notice of application for certification was received, by the fact that when Mr. Zinally returned from vacation he "strangely" did not come to see Dr. Kurian as employees normally did when they returned from vacation, and by the fact that Mr. Zinally had been the only person to voice opposition to a change in the respondent's sick leave policy proposed by Dr. Kurian at an employee meeting called by Dr. Kurian during January of 1981.

20. On the basis of all the evidence before it, the Board finds that it was only after Dr. Kurian became aware of the application for certification and concluded that Mr. Zinally was one of the union supporters that he decided to terminate his employment. This fact is confirmed by the evidence of Dr. Karmali who agreed in cross-examination that he "got the impression from Dr. Kurian around the end of January that the handwriting was on the wall for Mr. Zinally".

21. Dr. Karmali's conclusion that Mr. Tarachandra was a union supporter was in all probability based on his refusal to discharge the persons whom Dr. Kurian originally thought to be the union organizers, on his refusal to assist with or support an anti-union petition, and on the fact that Dr. Kurian had seen people on the medical side taking "extended coffee breaks" with Mr. Tarachandra, who had advised him that he was "training technicians in the coffee room".

22. Dr. Kurian's comments to Paul Plant, who is Chief of the Inspection Branch of the Ministry of Health's Laboratory Inspection Service, as supplemented by the respondent's

solicitor, Mr. Noike, during a meeting on April 15, 1981, provide considerable insight into Dr. Kurian's view of the role played by Mr. Tarachandra with respect to the attempt to unionize the respondent's workforce. Mr. Plant, who was subpoenaed to testify by the complainant, told the Board: "[Dr. Kurian] mentioned that Mr. Tarachandra had sabotaged the laboratory and his lawyer, Mr. Noike, supplemented Dr. Kurian's remarks and answer by indicating that there had been an effort to unionize the lab and that the problems mainly were a result of the agitators who had since been dismissed."

23. Dr. Kurian testified that he opposed the complainant's application for certification because he "felt that the relationship [he had] been trying to build for the last ten years would go down the drain." However, he stated that he "was prepared to go for a vote to get the matter over with". Following hearings before another panel of the Board on February 13 and March 12 of this year, a representation vote was conducted by the Board on March 26th with respect to the complainant's certification application. Since not more than fifty per cent of the ballots cast were cast in favour of the complainant, the application was dismissed (Board File No. 2299-80-R).

24. Mr. Zinally was discharged by Dr. Kurian on March 27, 1981, the day after the representation vote was lost by the complainant. At the time of his discharge, he was one of the respondent's longest term (full-time) employees. His discharge letter read as follows:

"March 27, 1981.

TO: CLEMENT ZINALLY

With regret, your employment with Alpha Laboratories Inc. is hereby terminated, effective today, by reason of your being unqualified for the position of technologist which you hold. A recent inspection by the Government of Ontario revealed that you do not meet the requirements of the regulations under the Public Health Act.

As a courtesy, you are being paid severance pay of two weeks wages, being \$538.46. You are also being paid all vacation pay owing to you, being \$99.62. Also enclosed is your pay cheque for the period ending March 27, 1981.

We are confident that you will be able to find suitable employment elsewhere, and we wish you all the best for the future.

Yours very truly,
ALPHA LABORATORIES INC.

(signed) Dr. C. J. Kurian, Director"

Thus, the only reason given to Mr. Zinally for his termination was his lack of qualifications; there is no mention in the letter of any of the myriad of other matters raised by Dr. Kurian as reasons for his discharge in his evidence before the Board. In assessing the true role, if any, which those reasons played in Dr. Kurian's decision, it is significant to note that Dr. Kurian stated in cross-examination that the first time that he considered firing Mr. Zinally was when

he received notification that Mr. Zinally's qualifications were not acceptable to the Ministry. Dr. Kurian's explanation for his failure to refer to the other matters in the letter was that he "didn't want to cause any problem for Mr. Zinally to find another job". His explanation for paying Mr. Zinally severance pay was:

"I paid him severance pay. I didn't want to raise any hardship at that time. I like people to leave on good terms. That's why people come back to us."

25. Mr. Tarachandra was also discharged the same day. His discharge letter read:

"March 27, 1981

TO: SANJAY TARACHANDRA

With regret, your employment with Alpha Laboratories Inc. is hereby terminated for cause, effective today, by reason of your repeated failure to follow instructions, especially, but not exclusively, in relation to laboratory procedures and ordering of supplies, your lack of application to the requirements of your position, and your general inability to satisfactorily fulfil all such requirements. You have been advised at various times of these problems but no improvement has been shown.

As a courtesy only, and without prejudice to the right of Alpha Laboratories Inc. to assert cause for your dismissal, you are being paid a further one week's pay (\$384.61) as well as all vacation pay owing to you (\$389.41). Also enclosed is your pay cheque for the period ending March 27, 1981.

We regret that this action is necessary but we are confident that you will be able to find suitable employment elsewhere.

Yours very truly,
ALPHA LABORATORIES INC.

(signed) Dr. C. J. Kurian, Director"

26. As in the case of Mr. Zinally, Dr. Kurian referred to a number of incidents which allegedly occurred during Mr. Tarachandra's employment with the respondent as justification for the discharge of Mr. Tarachandra, including failing in November to send certain specimens to the public health laboratory and adopting an indifferent attitude with respect thereto, failing to ensure that all tests were performed properly, failure to implement proper quality control procedures, ordering excessively large amounts of reagents, failing to ensure that proper steps were taken to expeditiously replace a broken part in one of the machines in the lab, taking lengthy breaks, sending to other labs tests which the respondent was licensed to perform, failing to keep the stockroom and coffee room "cleaned up", failing to sign reports, failing to prepare proper lab manual drafts, and failing to carry out various instructions received from Dr. Kurian. A number of those events occurred during Mr. Tarachandra's three month probation period but no action was taken against him in respect of them at that time.

Moreover, we are satisfied that a number of the charges are totally without substance. For example, we are satisfied that contrary to his testimony before the Board in this matter, Dr. Kurian did not instruct Mr. Tarachandra during his first month of employment to sign lab reports. We accept Mr. Tarachandra's evidence that when he expressed the view that he should sign the reports to comply with the Ministry's requirements, Dr. Kurian advised him to check the reports but not to sign them since it was the respondent's practice to have them signed by the medical secretary (as evidenced by the fact that the Ministry found non-compliance with that requirement prior to the time that Mr. Tarachandra was hired by the respondent and after Mr. Tarachandra had been discharged). It was only after the Ministry issued its report that Dr. Kurian reversed his previous instructions and directed Mr. Tarachandra to sign the reports. Mr. Tarachandra complied with all directions that he received from Dr. Kurian with respect to such reports.

27. Although Dr. Kurian had never given Mr. Tarachandra any written instructions, memos or warnings prior to January 30th, after that date their relationship, which had been quite cordial up to that point in time, deteriorated significantly and Mr. Tarachandra was inundated with such documents from Dr. Kurian. Under the circumstances, the Board finds that Dr. Kurian did so in an attempt to build a case against Mr. Tarachandra with a view to obscuring the anti-union motivation which was at least part of the reason for his ultimate discharge.

28. During his final argument, counsel for the respondent raised for the first time the submission that Mr. Tarachandra was not entitled to any remedy under section 79 of the Act since he exercised managerial functions or was employed in a confidential capacity in matters relating to labour relations, and was, therefore, not an "employee" within the meaning of the Act. Quite apart from the unfairness which would result if counsel were permitted to raise such an issue during closing argument without having given the other party any prior indication that the employment status of Mr. Tarachandra was an issue in these proceedings, the Board is of the view that the respondent, having included Mr. Tarachandra's name on the list of employees which it filed with the Board in the certification application, having agreed that Mr. Tarachandra was included in the bargaining unit, and having permitted Mr. Tarachandra to cast a ballot in the representation vote ordered by the Board, is estopped from denying that Mr. Tarachandra was an employee for the purposes of the Act at all material times. Moreover, even if the respondent could legitimately raise that issue, it has not established on the balance of probabilities that Mr. Tarachandra exercised managerial functions or was employed in a confidential capacity in matters relating to labour relations. Although Mr. Tarachandra did exercise some supervisory functions, exercising such functions does not by itself bring a person within the section 1(3)(b) exclusion. Even when a person is primarily engaged in the supervision of others, he is not managerial unless he also has effective control over their employment relationship (see, for example, *Hydro Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38; *Falconbridge Nickel Mines*, [1966] OLRB Rep. Sept. 379; and *McIntyre Porcupine Mines*, [1975] OLRB Rep. Apr. 261). The Board is not satisfied on the balance of probabilities that Mr. Tarachandra had effective control over the employment relationship of any of the employees of the respondent. Dr. Kurian testified that Mr. Tarachandra "did not have the right to hire or fire anyone"; all such decisions were made by Dr. Kurian himself. Although Dr. Kurian stated that Mr. Tarachandra "could discipline to some extent", he conceded that the question of disciplinary action by Mr. Tarachandra "didn't come up really, at all". There is no evidence that Mr. Tarachandra had power to grant employees time off, schedule employees to work overtime, promote employees or otherwise

affect their terms and conditions of employment. For the foregoing reasons, the Board rejects the argument that section 1(3)(b) precludes the Board from granting section 79 relief to Mr. Tarachandra.

29. Section 58 of the Act provides, in part, as follows:

“No employer, employers’ organization of person acting on behalf of an employer or an employer’s organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person *was or is* a member of a trade union or *was or is* exercising any other rights under this Act”.
- (Emphasis added).

As stated by the Board in *Wyeth Ltd.*, [1979] OLRB Rep. Dec. 1311, “[a]n unsuccessful representation vote simply cannot be allowed to become a signal for employer recriminations, nor is the dismissal of a certification application to be regarded as a licence permitting an employer to ‘weed out’ union supporters.”

30. It is clear from the facts set forth above that having concluded that Mr. Zinally and Mr. Tarachandra were union supporters, Dr. Kurian awaited the outcome of the certification vote and then discharged the grievors on the next day by purporting to rely upon the contents of the Ministry Report with respect to Mr. Zinally, and upon the case which he had carefully attempted to build against Mr. Tarachandra since the time that he concluded that Mr. Tarachandra was a union supporter.

31. For the foregoing reasons, the Board finds that the discharge of each of the grievors by the respondent was tainted by anti-union motivation and was, therefore, in contravention of section 58 of the Act. The Board further finds that if Dr. Kurian had not suspected that Mr. Zinally was a union supporter, Mr. Zinally would have received a salary increase of \$900 per year effective February 16, 1981. Accordingly, such increase is to be incorporated into the compensation to be paid to Mr. Zinally in respect of his unlawful discharge.

32. The Board therefore orders:

- (1) that Sanjay Tarachandra be reinstated by the respondent in his former position forthwith,
- (2) that Clement Zinally be reinstated by the respondent in his former position or in the most senior position that he is qualified to fill under the applicable Regulation made under *The Public Health Act*;
- (3) that Sanjay Tarachandra and Clement Zinally be fully compensated by the respondent for all lost wages and benefits sustained through the respondent’s violation of the Act;
- (4) that the respondent pay interest on the compensation for lost wages

ordered by the Board, such interest to be calculated in the manner described in Practice Note. 13 dated September 8, 1980; and

- (5) that the respondent post copies of the attached notice marked "Appendix", after being duly signed by the President of the respondent, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

33. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

DECISION OF THE BOARD MEMBER C. G. BOURNE:

The decision of Board Member C. G. Bourne will issue at a later date.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY DISCHARGING SANJAY TARACHANDRA AND CLEMENT ZINALLY.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES,

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION,

TO ACT TOGETHER FOR COLLECTIVE BARGAINING,

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS,

WE WILL NOT DISCHARGE OR OTHERWISE DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE HE HAS JOINED THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION.

WE WILL OFFER TO REINSTATE SANJAY TARACHANDRA IN HIS FORMER POSITION AND WE WILL OFFER TO REINSTATE CLEMENT ZINALLY IN HIS FORMER POSITION OR IN THE MOST SENIOR POSITION THAT HE IS QUALIFIED TO FILL UNDER THE APPLICABLE REGULATION MADE UNDER THE PUBLIC HEALTH ACT.

WE WILL COMPENSATE SANJAY TARACHANDRA AND CLEMENT ZINALLY FOR ANY WAGES AND BENEFITS THAT THEY LOST AS A RESULT OF THEIR DISCHARGE, PLUS INTEREST.

ALPHA LABORATORIES INC.

PER: C. J. KURIAH,
PRESIDENT

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0760-81-U B. C. L. Canada Inc. Applicant v. Amalgamated Clothing and Textile Workers' Union, Local 1332 and those persons named in "Schedule A" Respondents

Strike – Refusal to work overtime shifts – Whether employees acting in concert – Effect of *Employment Standards Act* on Board's direction

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: *W. J. McNaughton, L. M. Fourney for the applicant; M. A. Church, K. Smith and Roy Collins for respondents.*

DECISION OF THE BOARD; July 28, 1981

1. This is a complaint under section 82 of *The Labour Relations Act*. The complainant ("the Company") contends that a number of its employees have engaged in an unlawful strike by refusing to work overtime in concert, or in accordance with a common understanding. The sections of *The Labour Relations Act* relevant to this matter are as follows:

Section 63(1)

"Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out an employee."

Section 1(1)(m) — Definition of a Strike

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output."

Section 82

"Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened to engage in an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike."

2. At the opening of the hearing, the company withdrew its allegations against the union. The company is satisfied that the union officials have not authorized or encouraged the

employees to refuse to work overtime. On the contrary, it is acknowledged that the union has made every reasonable effort to discourage them from doing so.

3. It is agreed that the parties were bound by a collective agreement which began to operate on July 1, 1979 and was terminated, in accordance with its terms, on June 30, 1981. The terms of that agreement remain in full force and effect by virtue of section 70 of *The Labour Relations Act*. The parties have not yet completed the conciliation process. Accordingly, if the employees' refusal to work overtime constitutes a strike, it is an unlawful one.

4. The company produces a transparent cellulose film which is used as a packaging material. The production process is continuous. Rolls of film are produced on one of four casting machines, then each roll goes to the coating department, where it is dipped in a chemical bath, and dried by conveying it on rollers over a high tower, then down again to a point where it is rewound. There are three such towers. Each tower takes one roll at a time, but because the towers operate faster than the coating machines, there is ordinarily no significant backlog. The process operates continuously twenty-four (24) hours per day, seven (7) days a week.

5. The employees with whom we are concerned are all employed in the coating department. There are four (4) shifts, three (3) of which will be working sequentially in any twenty-four (24) hour period. When an employee is going to be absent from work, the normal procedure is to fill his position by calling in another employee on overtime. There is a well-established method for doing this, which is intended to ensure an equitable distribution of overtime opportunities. The mechanics of that system are not relevant to the issues before us. It suffices to say, that the foreman solicits *volunteers* beginning with the first individual on the "off shift" who has not recently worked overtime, and continuing, if necessary, through the various shifts until all members of the department have been canvassed. Overtime is voluntary. Article 2.09 of the collective agreement reads as follows:

"The union agrees that it will facilitate the working of overtime and double shifts, both overtime and occasional double shifts being necessary for the efficient operation of the Company's plant. The Company agrees that the working of overtime and double shifts are voluntary matters, the decision resting with the individual employee. When the normal overtime procedure does not cover for a temporary vacancy in a Department, the Company may obtain overtime, on a voluntary basis, from any qualified persons."

If, after canvassing all of the members of the department the foreman is unable to obtain a replacement employee, one of the "towers" is shut down for the shift in question. This, of course, creates a temporary production bottle neck, but until recently that has not been a serious problem.

6. Prior to April 13, 1981 there was no difficulty obtaining overtime coverage whenever it was required. After April 13, 1981, everything changed. From that date onwards, *no one* was willing to work overtime except to replace an individual absent on union business.

7. On or about April 13, all of the employees on the "B" and "D" shifts advised their foremen that they were no longer willing to work overtime. It was not unusual for an individual to advise his foreman that he did not wish to be called for overtime for a period of

time, and in such circumstances, the foremen would make a note of his name and no calls would be directed to him. But such widespread and systematic refusal is unprecedented. The other employees on the other shifts did not specifically communicate their unwillingness to work overtime, but the fact of the matter is, that after April 13 they all invariably refused to do so.

8. There is no doubt that the employees' refusal to work overtime has had a significant impact on the company's production process. From March 2, 1981 until April 12, 1981 the company was able to obtain coverage for all of its overtime requirements; but from April 12 onwards none of its requirements could be met. The impact was immediate. There was a growing backlog of rolls, and if the film is not coated shortly after it leaves the casting machine, there is an increased likelihood of breakage as it goes through the "tower". This creates more waste material as well as "down time" when the film breaks and has to be joined together and fed back into the system. There were also ramifications for the departments preceding and following the coating department. These departments had to respond to the bottle neck in the coating department, and by June 27 the backlog was so great that the company had to shut down one of the casting machines, which produce the raw product. The company has been able to accommodate the bottle neck to some extent to reordering its production priorities, and producing certain types of film which do not have to be coated. But there are real limits to the company's ability to cope with the problem.

9. The importance of overtime in the company's production process is graphically illustrated by the following table which sets out its overtime requirements in the six weeks immediately preceding April 13 (i.e., immediately preceding the employees' refusal to work further overtime and the company's various actions to accommodate this problem and reduce its overtime needs):

<i>Date</i>	<i>Overtime Employees</i>	<i>Date</i>	<i>Overtime Employees</i>	<i>Date</i>	<i>Overtime Employees</i>
March 2	2	March 17	1	April 1	2
3	2	18	0	2	2
4	2	19	0	3	1
5	3	20	2	4	2
6	3	21	2	5	2
7	3	22	2	6	2
8	2	23	2	7	2
9	2	24	4	8	1
10	4	25	3	9	1
11	2	26	3	10	1
12	1	27	3	11	1
13	1	28	3	12	0
14	1	29	1		
15	1	30	2		
16	0	31	2		

It is apparent that in the weeks preceding April 13, overtime was not a sporadic, occasional or unusual occurrence for the twenty-four employees (four shifts of five employees each and four "mixers") who worked in the coating department. A perusal of the data provided by the

company reveals that from March 2 to April 13 (forty-two days), overtime was required on thirty-eight days. Two employees were required on eighteen days, three employees were required on seven days, and on two days, four employees — virtually an entire shift — were required to work eight hours overtime. It is obvious that overtime was not being treated by the company as an exceptional circumstance, but rather as a general method of meeting its staffing requirements. Within this six week period, for example, employees Kyer and Losey worked five days overtime, H. Coreman worked six days, W. High worked seven days, and C. Conway worked nine days — this in addition to a regular seven day weekly shift! It would not be particularly surprising if such frequent resort to overtime met with some employee resistance — particularly where the agreement provides that overtime is voluntary.

10. But the employees' refusal to work overtime cannot be attributed solely to the frequency of the company's overtime requirements. The origins of the problem are more complicated than that. Only three employees from the coating department gave evidence. However, despite the hearsay quality of portions of that evidence (i.e., in respect of the views of the other employees) I am prepared to accept it as a fairly accurate portrayal of the problems which prompted the coating department employees to decline the overtime opportunities extended to them. The situation is best summarized by Maurice Labelle, who attributed the overtime ban to an "accumulation of frustrations".

11. Since at least the fall of 1980 the company has been experiencing financial difficulties requiring production cutbacks, and reorganization. One feature of this reorganization involved the reduction from six to five of the number of employees working on the "tower". This, in turn, increases the workload for the remaining individuals who have to climb the tower with greater frequency and more frequently exposed to the solvents involved in the process. The situation was exacerbated when the fourth casting machine went back into operation in February. As Ed Kyer, Art DiCola, and Maurice Labelle explained it, the employees "became fed up" with the five man operation and the demands it put upon them over a seven day shift. When Kyer (a union official) returned from his vacation, he was told by the employees that they were no longer working overtime. As he put it, the situation "just mushroomed". The employees had all decided that they were no longer prepared to work overtime under the new conditions. There seems little doubt that the employees' decision is in accordance with a common understanding and that the root of the problem is the manning of the tower. Yet no one has filed a grievance — even though the agreement provides a mechanism for resolving the "equity" of a change in workload, and an arbitrator is empowered to determine whether the workload is "excessive". Article 13 of the agreement reads as follows:

"Work Load and Method Change

When the Company institutes changes in work loading methods or work assignments, the following procedures shall apply:

- (a) The Company shall first inform the union that a change is to be made and the approximate date thereof. If either party feels that a meeting is necessary, they shall arrange such a meeting twenty-one (21) days prior to the institution of such change and the Company will furnish all necessary information on the change.
- (b) If there is any question as to the equity of the change, or if the Union

feels that there should be an adjustment in wage rates applying to the area of the jobs so changed, it is agreed that a grievance can be instituted and taken to arbitration if it is felt necessary. The arbitrators' authority in such cases shall be limited to deciding whether or not a wage adjustment is justified, and/or the work load is excessive."

12. The union raised but did not press the application of the *Employment Standards Act*, which prohibits an employer from scheduling "overtime" work beyond eight (8) hours in the day or forty-eight (48) hours in the week (a "week" being defined as seven consecutive days), unless the employer has a permit from the Director of Employment Standards AND the consent of the employee or his agent. Hours of work averaging arrangements which may contravene an employment standard likewise appear to require the permission of the Director. (See sections 17-22 and the associated regulations.) Here, the company has neither an overtime permit, nor permission from the Director for its scheduling scheme; however, the union does not raise any absolute defence on this basis. Given the frequency of the company's overtime requests, the union is prepared to agree that some of them, at least, would have been within the limits established by the Act. Since most of the employees did not appear at the hearing, I have no evidence concerning their particular situations, and no way of knowing whether some of them might have advanced a defence on this ground. It might be noted, however, that in view of the employees' regular seven day shift, and the frequency of the company's overtime requirements it would be surprising if some of the employees did not have a valid defence on this basis. I do not think the strike prohibition was intended to apply in a situation where the work which is refused could not be legally required because it exceeds a *statutory* maximum, or where a *statutory* condition precedent has not been fulfilled. (See *Cameron Packaging* [1979] OLRB Rep. June 489.) In these circumstances, an employee can rightly say "I will not work"; a group of employees can rightly say "we will not work"; and I do not think it matters in the least that it can be said that the group are acting in accordance with their "common understanding" of the statutory protections afforded them, or are, as a group, exercising a right to which they are entitled by law. I raise this matter only to make it clear that nothing in this decision should be construed as depriving employees of rights which they have under the *Employment Standards Act* or as requiring them to work beyond the maximum hours therein prescribed.

13. In the union's submission a similar approach must be taken to a purported exercise of rights under a collective agreement, for, it argues, the legislature could not have intended that employees would be engaging in an illegal strike by refusing work which an employer has no right under the collective agreement to assign — either because work of that kind, or in those circumstances, is absolutely prohibited, or because the employer has failed to comply with a mandatory contractual condition precedent. [See *John Inglis* 53 CLLC ¶ 17,049.] If the collective agreement clearly prohibited work on Sunday, for example, it could not be said that they were engaging in an unlawful strike if they refused to work on Sunday — even if they were doing so in accordance with a common understanding of what their obligations were under the collective agreement. "Work now — grieve later" may well have a place in the law of collective agreement arbitration, but it is quite another thing to say that employees who insist on rights which they *clearly have* under a collective agreement are, in so doing, breaking a public statute and exposing themselves to quasi-criminal liability. In assessing the employees' conduct in this case one must look at their obligations under the collective agreement — if not for the determination of whether they are on strike, then certainly whether this Board should

exercise its discretion to so declare and issue a cease and desist direction. If the Board did not do so, it might find itself in the anomalous position of effectively rewriting the parties' collective agreement by forbidding employees from exercising rights which they clearly have. Nor can the voluntary overtime provision in the collective agreement be viewed as illegal in itself or an attempt to authorize a strike during the term of the collective agreement.

15. I agree that in order to assess the propriety of the employees' conduct in this case, it is not enough to show that a group of them have refused to work overtime because they shared a common aversion to overtime work — or to put it as Mr. Labelle did, that they were “fed up” with working extended hours. Valid employee concerns of this kind can and do arise in a group setting, and when employees do share such concern a similar response may be natural. The evidence discloses that this has occurred from time to time in the past and when the employer has been unable to meet its manning requirements it has shut down one of the towers. That is a risk it takes when it permits voluntary overtime especially since the withdrawal of some employees from the pool of those available to work overtime puts added burdens on the rest, and would increase the likelihood that they too would soon get “fed up”. It is not suggested that these past refusals constitute a strike nor do I think one could say that employees were engaged in concerted, (and therefore unlawful) activity simply because, in response to an employer's request, several of them refused to work citing their disenchantment with overtime. And in deciding whether their activity was “concerted” in the sense contemplated by the statute, one might well look at their motivation, whether they were merely exercising a right under the agreement, or whether there is some collateral collective bargaining purpose.

16. Here employees have been regularly working overtime for some considerable time, — some a little, some a lot — and it is a little hard to accept that all of them, to a man, would suddenly, on April 13, get “fed up” to the same degree, and refuse to work *any* overtime *for weeks* thereafter, except, to relieve a fellow employee on union business. The synonymous onset of debilitating fatigue in a group of employees whose overtime work varies considerably must be regarded as a medical miracle. Likewise, a sudden concern with family responsibilities. That is simply not what the evidence suggests. It is not just the overtime with which the employees are concerned, but also the employer's decision to reduce the *number of men* in the tower from six to five. Even if the production speedup and staffing changes raised the general level of fatigue, I still do not think it could explain so sudden a withdrawal of overtime work. The witnesses were quite candid on this matter, and I have no doubt that if the original crew were returned, overtime would begin again like magic. And what does the collective agreement say about this problem? In the first place, it specifically envisages that overtime decisions will be made on an *individual* basis. The clause is drafted in order to accommodate individual needs and problems. That is not what happened here, for as Mr. Kyer testified, he was advised at a meeting of the employees, that they had decided *as a group* to refuse any further overtime. And how does the agreement contemplate that work load problems will be resolved? Not by an overtime ban, but by a reference to arbitration. The agreement provides a specific mechanism whereby employees can question the fairness of a management decision to change their workload. Yet no grievance was filed; and what else could that clause have been directed to than the kind of situation present here? When read with the “no strike” clause, the clear implication is that workload disputes will be resolved by arbitration, not by a collective refusal to work. Thus, even if the Board accepts the union's view that I must look at the collective agreement, I do not think it supports an overtime ban. And even if one accepts that a *group* of employees might refuse overtime by reason of fatigue, family commitments, or even a wish to

go to a football game and it might not be an unlawful strike, that is not the situation here. On the contrary, the situation is much closer to that described by the B. C. Labour Relations Board in *Weyerhaeuser Canada*. [1976] 2 Can LRBR 41:

“How does an overtime ban by a union appear within that analysis? This Union contended that the provisions of the collective agreement quoted earlier make overtime voluntary in certain situations (albeit compulsory in others). An employee is entitled to refuse an overtime assignment if he so chooses. If the employees collectively choose to exercise that contractual right, they cannot be said to be on strike in violation of the Labour Code. In the words of the statute, they are not refusing “work”, because this kind of overtime is not the kind of work which as employees they are contractually bound to perform.

That analysis does fall prey to the fallacy we mentioned earlier of singling out one element of the statutory definition and considering it in isolation from the rest. When an employer agrees that overtime will be voluntary, it gives the individual employee the choice about whether to accept a particular overtime assignment. The assumption is that some of the employees will want to work a lot of overtime, others very little; some employees will be interested in overtime at some times, others at different times. But the employer experience is that the availability of premium pay for overtime work will attract sufficient volunteers from the total work force that necessary overtime is performed without undue problem. (Indeed, most collective agreements have a provision requiring an equitable sharing of overtime among employees who may want more than is available.) That situation is qualitatively changed when an overtime ban is instituted by the union. Now all employees refuse all overtime work, out of conviction or by reason of union discipline. The employer, which previously had no problem in securing volunteers for needed overtime work as it occurred, now faces what is, in effect, a partial withdrawal of labour. Irregardless of the fact that the employer previously had no contractual right to order an individual employee to work overtime, the new collective situation places a significant economic pressure on the employer, especially after a period of time. If the union has organized the overtime ban to win certain employment concessions from the employer, this step will likely make the employer somewhat more malleable. But that action by the union amounts to a “strike” and its legality will turn on the application of ss. 79 and 80 of the Code.”

17. In the present case, I am satisfied that the employees have engaged, and are continuing to engage, in an unlawful strike. The question remaining is whether this Board should exercise its discretion to so declare; and issue a cease and desist order. The principles underlying the exercise of that discretion were discussed in *Canadian Elevator Manufacturers* [1975] OLRB Rep. Nov. 868 at 872:

“The Board’s power under section 82, 83 and 123 are discretionary and ought to be exercised in accord with sound principles of industrial relations. While the Board has a public obligation to foster and maintain

industrial peace, it cannot be said that this obligation can only be fulfilled by the reflex-like exercise of the Board's powers under these sections. Where, as in this case, an employer deliberately embarks upon a course of action that is unsupported by a reasonably arguable interpretation of the collective agreement, thereby primarily, and we might say baldly, resting its claim on the principle that an employee is obligated "to perform first and grieve later", this Board would not be serving the public by buttressing such recklessness with the full force of the laws of this Province. We of course approve the aforementioned arbitral principle and the Board must be wary in interpreting collective agreements even on a very limited basis. But the application of the arbitral principle in discipline cases is a qualitatively different function than using it to specifically enforce the demands of an employer under the sections in question. To issue such powerful relief in the peculiar circumstances of this case could well undermine the integrity of the Board's orders and discourage the self-restraint required in a complex industrial society. Very similar sentiments, quite appropriate to this case, were expressed by the Board in *Northdown Drywall and Construction Limited* [1972] OLRB Mthly. Rep. June 666 where the majority of that panel evidenced its concern for self-government in the following way:

... We recognize that this Board has an obligation to maintain industrial peace. We recognize that there is an obligation on the industry to assist in maintaining industrial peace by conducting its affairs in an orderly and careful manner so as to avoid the tensions and conflicts that are already rampant in the construction industry. There must be some form of self-help or policing by the industry. This Board is not to be viewed as a panacea for the ills of the construction industry. We do not sit as Solomon ever ready to divide the baby. We expect that the parties will exercise some self-restraint in their affairs and not expect this Board to be a forum which absolves them from excesses.

The facts obtaining in Board File 7425-74-U are distinguishable in that the provisions of the contract in that matter were reasonably in dispute; although even in that case the Board adopted a unique procedure to assure itself that industrial peace would be best served by the exercise of its remedial powers."

This case does not fall within those parameters. While there is some indication that the employer's reliance on overtime is excessive, on the basis of the evidence before it, the Board cannot conclude that the employer's conduct is so reckless or unreasonable that it should be denied a remedy under section 82. Most of the employees affected chose not to appear to give evidence with respect to this, or any other aspect of the case; and, as I have already noted both the voluntary overtime clause, and the workload clause in the parties' agreement provide a safety valve to avoid abuse. The Board is not unmindful of the manner in which frustrations can sometimes develop in the workplace but the whole scheme of our legislation is grounded on the principle that concerted economic pressure should not be resorted to during the currency of a collective agreement.

18. Having regard to the foregoing, the Board declares that by undertaking a concerted refusal to work overtime the employees on Schedule A have engaged, and are continuing to engage, in an unlawful strike. The Board directs:

- (1) that all employees on Schedule A and anyone having knowledge of this Order shall forthwith cease and desist from engaging in an unlawful strike, and, in particular shall cease and desist from refusing to work overtime in concert, or in combination or in accordance with a common understanding. Nothing in this direction requires any employee to work any overtime beyond the legal limitation prescribed by the *Employment Standards Act*.
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0116-81-R Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Bramalea Carpentry Associates** and Pinehurst Woodworking Company Limited, Respondents.

Related Employer – Non-union business establishing union firm – No interchange of employees between firms – Whether Board exercising discretion to issue declaration

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *M. A. Church, M. Whelan and W. Armstrong for the applicant; A. Craig and W. Christie for the respondents.*

DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER, H. J. F. ADE; July 29, 1981

1. This is an application under section 1(4) of *The Labour Relations Act*. The applicant union seeks a declaration from the Board that Pinehurst Woodworking Company Limited ("Pinehurst") and Bramalea Carpentry Associates ("Bramalea") are one employer for the purposes of *The Labour Relations Act*. Section 1(4) reads as follows:

"Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

2. Bramalea is a partnership of William Donald Christie and James Herbert Christie formed in 1968 to carry on the business of carpentry contracting. Initially, the business was engaged only in small scale residential renovation and involved only the Christie brothers themselves. It was operated from William Christie's home. As the firm became better known however, it began to do more commercial construction work, and by 1971 seventy per cent of its activities involved commercial construction. By this time, the expanding business employed four employees, had leased premises on Drew Road in Mississauga, and was beginning to acquire more assets. The firm's solicitors advised the Christies to create a corporate vehicle through which to carry on business; and in November 1972 Pinehurst was incorporated. Bramalea became temporarily dormant. The prefabrication and installation work previously done by Bramalea was carried on by Pinehurst.

3. By 1973 it became apparent that some of Pinehurst's commercial clients would require work on "union" jobsites – that is, sites where outstanding contractual arrangements restricted the work to unionized subcontractors. In order to secure access to this work, it was decided to resurrect Bramalea and establish it as a "union" subcontractor. Bramalea entered into contractual relations with the carpenters union on August 30, 1973, and has been bound by a series of collective agreements since that time. There is no dispute that Bramalea is currently bound by the province-wide Carpenter's collective agreement.

4. Whenever Bramalea required carpenters they were obtained through the union hiring hall and directed to report to the jobsite. Indeed, Bramalea was a model employer in this regard. Over the years it faithfully adhered to the terms of the collective agreements, hired trade union members, and paid union rates and benefits. Bramalea has only one steady employee, John Killick, its site supervisor (and a union member).

5. The activities of Bramalea on union sites were kept completely separate from those of Pinehurst which looked after the non-union work. Pinehurst did all of the bidding and fabrication, but when it became necessary to install its products on union jobsites, Bramalea was the vehicle used. The installation of Pinehurst's products is Bramalea's principal business. The only exception is when Pinehurst is unable to produce all of the material needed for a particular job. Pinehurst occasionally supplies other unionized subcontractors.

6. Because of the rigid separation of the union and non-union aspects of the business, and Bramalea's faithful adherence to the collective agreements by which it was bound, there is no reason why the union would become aware of Pinehurst, which did not operate in the unionized sector of the construction industry. The volume of work performed by Pinehurst is much larger than that of Bramalea, but that work is not performed on sites where Pinehurst would come to the union's attention. Pinehurst now employs about 40 employees: 20 in its woodworking shop, 8 to 14 installers, and miscellaneous office staff. Unlike Bramalea whose employee complement fluctuates with the volume of installation work undertaken, the employee complement of Pinehurst is relatively stable, with some of its carpenters working in the shop or on site as circumstances require. The nature of the installation work is the same. Employees of Bramalea are never employed on Pinehurst jobs or in the Pinehurst shop.

7. There is no doubt that Bramalea and Pinehurst carry on related activities or businesses under common control or direction. The Christie brothers are the sole principals of Bramalea and, with their wives, the directors and officers of Pinehurst. From a practical point of view they run both businesses. The two firms operate from the same location, and have the

same lawyer, accountant, and office staff. DeAnn Christie, William Christie's wife is a Vice-President and employee of Pinehurst, and does the books for the two firms. She records the receivables, issues cheques, prepares the payroll, and does miscellaneous secretarial duties for both businesses. All of the tools and equipment are owned by Pinehurst. The Pinehurst name appears on the tool boxes. Gordon Duncan, a construction co-ordinator employed by Pinehurst handles employee relations on non-union sites for Pinehurst and on union sites for Bramalea. There is no chargeback to Pinehurst for this service. From 1977 to 1981 employees of both companies were regularly paid by cheques issued by Pinehurst. Separation slips also bore the Pinehurst name and employer number. Even union dues and welfare fund payments sent to the trustees of the union trust fund (originally managed by W. M. Mercer Limited and later by Gordon J. Manion and Associates Limited) were remitted on Pinehurst cheques. Because separate payroll companies are not unusual, and Bramalea was never delinquent in its payments, there was no reason to question this practice or inquire into the relationship between Bramalea and Pinehurst. The benefit fund administration companies have no organic link to the union which hires them, and we do not think information which they might have had can automatically be attributed to the union. In any event, there is no evidence to suggest that the trust fund administrators ever recognized that Pinehurst might be anything more than a payroll company for Bramalea. Certainly there was no indication that it might be an employer in its own right carrying on a related parallel business.

8. Prior to January, 1981, we are satisfied that the union officials could not reasonably have known on the relationship between Bramalea and Pinehurst. It is not unusual for manufacturing concerns to use unionized installation subcontractors, so the presence of Pinehurst Products on a union jobsite would not trigger any suspicion. Nor would the Pinehurst name on some of the tool boxes. The Carpenters' collective agreement requires unionized subcontractors to supply their employees with tools and the rental of such tools is quite common. John Killick, the only steady employee of Bramalea, a site supervisor and a union member, never notified the union of any possible relationship between Pinehurst and Bramalea; and, of course, neither did the owners of the two businesses.

9. The union first discovered Pinehurst early in January 1981, when that company became involved in what it mistakenly thought were "non-union" projects at St. Regis College and Woodside Mall. Pinehurst had earlier been advertising in the newspapers for carpenters for its non-union operation, but had agreed to hire two out-of-work union members who had applied for these jobs. It was these carpenters who were dispatched to the Woodside Mall site when Pinehurst learned that it was a union project. The union, in turn, filed a certification application based upon its membership at the Woodside site, but later withdrew that application when it learned that Pinehurst employed a number of employees at other sites in the area and, as Matthew Whelan, the union business agent told the Board, "we just didn't have the horses" to succeed in a certification application. At about the same time the union discovered Pinehurst using non-union employees on the St. Regis College site – again because William Christie had erroneously believed that he was dealing with a non-union contractor and accordingly, used the Pinehurst vehicle. Further investigation revealed the relationship between the two firms, and a section 1(4) application was filed.

10. There is no question in this case that the conditions necessary for a 1(4) declaration have been met. Pinehurst and Bramalea are engaged in related activities or businesses under common control and direction. The only question is whether the Board should exercise its discretion to make a section 1(4) declaration, where, as here, the respondents have operated

related parallel businesses for many years, and the union could not reasonably have been aware of it. The union urges the board to issue a section 1(4) declaration because it moved with reasonable dispatch upon becoming aware of the two related companies and because, it argues, they should not be “rewarded” for their longstanding successful “double-breasted operation”. The union does not seek a déclaration with any retroactive effect or any remedy arising from past business relationships. The union only seeks access for its members to Pinehurst’s non-union installation work, and undertakes to admit all of Pinehurst’s present installation employees into membership. The respondents argue that there has been no erosion of the union’s bargaining rights and that the Board should not thrust a bargaining relationship upon a group of long term employees of Pinehurst who may have no wish to be represented by the applicant. Section 1(4), the respondent argues, should not be used as a substitute for certification – especially when the non-union entity predated the unionized one.

11. Section 1(4) of the Act is designed to deal with situations where the economic activities giving rise to the employment relationships regulated by the Act, are carried on by or through more than one legal entity. Where such legal entities are engaged in related economic activities under common control and direction, the Board is entitled to “pierce the corporate veil” and treat them as one business or employer for the purposes of the Act. The legislature has determined that legal form should not dictate (and possibly fragment) the collective bargaining structure; nor should corporate restructuring undermine established bargaining rights. Because of section 1(4), those rights need not be treated as coextensive with the legal framework of the business, and to this extent, labour law policy seeks to insulate collective bargaining from uncertainty at the inception of the bargaining relationship, or disruption should the exigencies of the market prompt the employer to change the number or form of the legal vehicles through which it carries on business. Each of these functions of section 1(4) was referred to by the Board in *Industrial Mines Installations Limited* [1972] OLRB Rep. Dec. 1029:

“Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al*, [1971] OLRB Rep. 406.

It is in these types of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted."

But a section 1(4) declaration is discretionary. It is not intended to be an automatic response in every situation where its statutory preconditions are met. In determining whether that discretion should be exercised, the Board must have regard to both the mischief to which section 1(4) was directed, and the particular context under review.

12. In the present case there is no interchange of employees between the two firms. There is no common labour force, or pool of employees drawn upon by the two companies in the manner mentioned by the Board in *Industrial Mines Installations Limited supra*. There is no indication that work actually destined for Bramalea has ever been redirected to Pinehurst, or that Pinehurst has been used surreptitiously on unionized jobsites to the detriment of Bramalea. It may be argued that the Christies have gained a "benefit" from having access to unionized sites without extending the opportunity to work on non-union jobs to Bramalea's employees; but the union has also obtained a benefit. It was able to acquire bargaining rights for Bramalea even though there is no evidence that it represented any employees at the time that the voluntary recognition and collective agreement were concluded; (Bramalea probably had no employees at this point), and having no support, it would not have been able to apply for certification for either or both of the respondents without an organizing campaign to enroll the non-union employees into membership. Had the union been aware of Pinehurst at the inception of the relationship, it would have had to do what it now claims is unnecessary; namely, demonstrate support among Pinehurst employees. Why should the passage of time improve its position? If anything, the passage of eight (8) years suggests that the Board should be reluctant to disturb the industrial relations status quo! Pinehurst and its employee complement were established well before the union relationship with Bramalea, and there is no dispute that the Pinehurst employee complement is, and always has been, larger than that of Bramalea. The effect of a section 1(4) declaration would be to sweep a relatively large group of employees into both the union and the bargaining unit. This the respondent characterizes (not inaccurately) as "the tail wagging the dog".

13. The union business agents who gave evidence were commendably candid with respect to this matter. Both acknowledged that a significant accretion to the union's

bargaining rights would occur if a section 1(4) declaration was made. Indeed, one indicated that the union's certification application had been withdrawn *because* the union did not enjoy the support of the employees affected by it, and the other told the Board that he thought it would be "unfair" to sweep into the union employees that it had not sought to organize. In the circumstances, the union's undertaking to admit all these individuals into membership is a perfectly natural response to an acknowledged realization that by applying section 1(4) the union would be gaining something that it would not otherwise have had. In this respect, the situation may be contrasted with that of a unionized firm which creates a non-union subsidiary to do work which would otherwise (and could reasonably be expected to) come to the union firm.

14. There is no compelling reason to use section 1(4) to rationalize the bargaining structure – even assuming that the Board would be prepared to do so without a showing of support among the Pinehurst employees. Businesses such as that operated by Pinehurst are normally covered by a separate "shop agreement"; not the province-wide I.C.I. agreement which the union now seeks to have applied to the installation (and only the installation) employees employed by Pinehurst. Most of Pinehurst's employees would be beyond the ambit of the collective agreement as would the installation crew when they were working in the shop.

15. In a number of cases the Board has observed that section 1(4) is designed to *preserve* rather than *extend* bargaining rights. It is not to be used as a substitute for certification. (See: *Farquhar Construction Ltd.* [1978] OLRB Rep. Oct. 914 and cases cited therein; *H. Allaire & Sons Co. Ltd.* [1974] OLRB July 457; *Inducon Construction* [1975] OLRB Rep. Apr. 399; and, most recently *W.M.I. Waste Management* [1981] OLRB Rep. March 409.) In our view, that is precisely what the union is trying to do in this case, where there was an established business and employee complement predating the bargaining relationship, and no evidence of a concrete erosion of the union's bargaining rights. Accordingly, the Board is not prepared to exercise its discretion to issue a section 1(4) declaration. If the union wishes to acquire bargaining rights for the Pinehurst employees, it will be necessary to enroll them into membership, and apply for certification.

16. The application is dismissed.

DECISION OF BOARD MEMBER C.A. BALLENTINE;

1. I disagree with the majority decision of the Board whereby it declined to exercise the Board's discretion to issue a section 1(4) declaration.

2. As stated by the majority decision in paragraph 7: "There is no doubt that Bramalea and Pinehurst carry on related activities or business under common control and direction". Therefore, the statutory preconditions for a 1(4) declaration have been met. The only issue is whether the Board should exercise its discretionary powers and grant a section 1(4) declaration.

3. In determining whether the Board should exercise its discretion to grant a section 1(4), the Board must have regard to the mischief the legislature envisaged when section 1(4) was invoked.

4. The mischief in the present case results from the related companies under the

control of the Christies, operating a union and non-union in the related carpentry field of construction (sub-contractors). This structure places them in a privileged position of tendering to the general or prime contractor over a reputable unionized carpentry contractor. The potential is there to work out a deal with a general unionized contractor who is in contractual relations with the Carpenters' Union. Two prices can be submitted. The company then proceeds to perform the work with the non-union arm at the lower price. If by chance the union catches them, it is a simple matter to switch to the union arm and complete the job. The majority acknowledge that if this were happening a section 1(4) declaration might be appropriate, but *there is evidence* that this happened in the instant case. I do not think it was a "mistake". We do not know how many times this has happened in the past or could happen in the future.

5. I do not accept the evidence of William Christie, that he erroneously believed he was dealing with a non-union general contractor on the Woodside Mall and St. Regis College projects, as the majority have stated in paragraph 9 of the decision. Nor can I agree with the majority when they state in paragraph 12 that "There is no indication that work actually destined for Bramalea has ever been redirected to Pinehurst". The general contractor on both of these projects was R. G. Kirby & Sons Ltd., a member of the Toronto Construction Association and a long-time unionized general contractor, who is in a contractual relationship with the applicant union.

6. Mr. Wm. Armstrong a business agent of nine months with the applicant union gave evidence that he first became aware of "Pinehurst", the non-union arm of the Christie's, when he had visited the Kirby project at Woodside Mall on a routine visit. He approached two carpenters and asked them who they were employed by, he received an answer from one of them that the company was "Pinehurst", a subsidiary company of "Bramalea" (the union arm of the Christies). It just happened that these two carpenters were members of the applicant union, who had answered a newspaper ad, placed by William Christie, in the Toronto Star. The ad didn't list the name of a company, just a telephone number, (the same number is used by the double-breasted companies). Subsequent to Mr. Armstrong's visit the two carpenters were paid the union rate and welfare benefits were submitted in accordance with the carpenters' collective agreement with Bramalea.

7. Under cross-examination, William Christie described the incident with the two union carpenters at the Woodside Mall as "just a coincidence". However, he stated they were sent to the Woodside Mall after two non-union carpenters had been kicked off the job. Counsel for the applicant union put a question to him that the two union carpenters believed they were working for Pinehurst. Mr. Christie said this was not true. Mr. Christie admitted the two union carpenters were laid off before the work was completed at the Woodside Mall, and he claimed John Killick, Bramalea's site supervisor finished the work.

8. Notwithstanding William Christie's claim that the St. Regis College project was a mistake the same as Woodside Mall, Mr. Armstrong on a routine visit to St. Regis College, several days after the incident at Woodside Mall had found two non-union carpenters employed by Pinehurst. On a complaint to the project superintendent of the general contractor, "Kirby", the non-union carpenters were immediately removed. The work was completed by Kirby by hiring union carpenters directly under the terms of the collective agreement between R. G. Kirby & Sons Ltd. and the Carpenter's Union.

9. I disagree with the majority describing “Bramalea” as being a model employer as they have in paragraph 4. The Christies devised a scheme that benefits them in a commercial sense to the detriment of the unionized carpentry contractors and they did erode the union’s bargaining rights at both the Woodside Mall and the St. Regis College projects. With the majority decision of this Board they have the potential of continuing this mischief.

10. In paragraph 12 it is beyond my comprehension how the majority can conclude that the applicant union has benefited through the Christies’ gaining a voluntary recognition agreement with the union in 1973. William Christie approached the Carpenters’ Union in 1973 to obtain an agreement so Bramalea would have a licence to tender carpentry work to the unionized general contractors. The Carpenters’ Union have the bargaining rights for the unionized general contractors and, under the collective agreement, the general contractors either engage union carpenters directly or they are obliged to sublet the work to a contractor in contractual relations with the union. The evidence from William Christie is that the only time they ever used Bramalea and engaged union carpenters was when it was necessary where the general contractor was already unionized. How did the carpenters union benefit? The Christies are the only beneficiaries, they pay the carpenters under “Pinehurst”, the non-union arm, \$11.00 to \$12.00 per hour. Compared to the union rate of \$17.00 per hour. This is a good business arrangement but is it the type of normal labour relations “scheme” that the legislature contemplated when it found it necessary to invoke section 1(4) in 1971 and subsequently had to add amendments? I think not.

11. I do not have the same concerns that the majority have expressed in paragraphs 12, 13 and 14, in regard to extending the union’s bargaining rights of a section 1(4) declaration was made. In section 1(4) declarations there generally is a situation where some maybe displaced or maybe swept into the bargaining unit. At the hearing in the instant case Board Member Ade questioned the union what would happen to the non-union employees if a section 1(4) declaration resulted, the union’s position was that they would accept the Pinehurst non-union carpenters into membership if they applied. The union’s position is quite clear, they are not pursuing the shop employees of the Christies’ operations, but they are endeavouring to consolidate the double-breasted operation in regard to on-site construction.

13. It is my decision that Bramalea Carpentry Associates and Pinehurst Woodworking Company Limited are one employer, for the purpose of the Act, and are bound to the Province Agreement of the applicant union for on-site construction work in the carpentry trade. A section 1(4) declaration should be declared to correct the mischief of the Christies’ operation.

0432-81-R Health, Office and Professional Employees, Local 1976
Chartered by the United Food & Commercial Workers International
Union, C.L.C., A.F.L.— C.I.O., Applicant, v. **Brewers Nursing Home**,
Respondent, v. Group of Employees, Objectors

**Bargaining Unit – Whether employee not working on application date included in count –
Various Board policies considered**

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

DECISION OF THE BOARD; July 30, 1981

1. By decision dated June 22, 1981 in this application for certification, the Board appointed a Board Officer “to inquire and report to the Board as to the nature of the employment relationship, if any, which existed between the respondent and Joanne Johnston on the date of this application (May 27, 1981), and as to the nature of the work performed by Lois McAlpine.”

2. In a joint letter dated July 10, 1981, the representatives of the parties advised the Board that they had agreed to submit written argument to the Board by July 25, 1981, with respect to Ms. Johnston, on the basis of the following agreed statement of facts:

“1. Joanne Johnston, a student, made application for summer employment with the Respondent Nursing Home by application dated the 29th day of April, 1981 for work as a Nurses Aide or Kitchen Aide.

2. She was initially interviewed by Nancy Ostrander, Administrator — Director of Nursing Services on April 29th, 1981.

3. Joanne Johnston was hired to work in the nursing home by Nancy Ostrander in a telephone interview on May 21st, 1981 at which time Joanne Johnston accepted employment.

4. A second interview on June 2nd, 1981 was conducted. The Interviews on April 29th, 1981 and June 2nd, 1981 were at the Respondent nursing home.

5. Joanne Johnston attended at the nursing home on June 11th and June 18th for two hour orientation procedures. Ms. Johnston was not paid for those two attendances at the Respondent nursing home.

6. On June 23rd and thereafter Ms. Johnston attended at the nursing home and from that date and continuing was paid for work performed as a Kitchen Aide.”

In their joint letter the parties also stated:

“The parties reserve the right to make submission to the Board

regarding the Union's challenge to Lois McAlpine and the Union may be making a further submission with respect to an employee — Joanne Lynch.

The above two challenges are dependent upon the Board's decision relating to Joanne Johnston."

3. The applicant submitted the following written argument with respect to Ms. Johnston:

"It is the applicant's contention that Joanne Johnston was not an employee of the respondent on the date of application, May 27, 1981, within the meaning of the Act.

Joanne Johnston is a student employed during the school vacation period and as such applied for a job April 29, 1981 and was notified, by phone, of her acceptance on May 21, 1981. She was interviewed on June 2, 1981. She attended the Home for two *unpaid* two hour orientation sessions on June 11th and June 18th. She finally reported for work on June 23, 1981 at which time she became employed as a kitchen aide and began to receive wages.

Until June 23, 1981, the respondent exercised no management control over Joanne Johnston.

Until June 23, 1981, Joanne Johnston was not an employee of the Home having performed no work for the respondent.

Joanne Johnston did not attend the Home, even for unpaid orientation, until June 11, 1981, some nine days after her initial interview with the respondent, some twenty-one days after being informed that she would get the summer job, and some fifteen days after the date the applicant applied for certification.

There were none of the normal ingredients of employment in the relationship between Joanne Johnston and the respondent on May 27, 1981.

The Board should find, based on the facts that Joanne Johnston was not an employee of the respondent on the date of application."

4. In his written submissions to the Board, counsel for the respondent stated:

"Further to the joint letter of myself and Mr. Reilly dated July 10, 1981, and enclosed Statement of Facts, it is respectfully submitted that Joanne Johnston should be included in Schedule B for the purposes of the count in this application for certification. At the outset I might add, without reference to personnel files, it was my client's understanding that Joanne Johnston had in fact attended at the nursing home prior to May 27, 1981, for the two-hour orientation procedures referred to in paragraph 5 of the Agreed Statement of Facts.

In any event, it is agreed between the parties that Ms. Johnston was actually hired prior to May the 21st, 1981, as a nurse's or kitchen aide. Accordingly, there is no question that there was an intention on both the part of the home and Ms. Johnston that an employment relationship be established for the Summer while she was on vacation from school.

This intention was carried forward in that Ms. Johnston actually commenced employment, and continues employment, with the nursing home.

There is no evidence before the Board, nor is there an allegation before the Board, that this employee was hired in an effort to dilute the bargaining unit in the face of a union application for certification. On the contrary, the Agreed Statement of Facts sets out a bona fide hiring of a summer employee.

As a result it is respectfully submitted that this employee has a very definite interest in the application for certification by the union and at all appropriate times was hired by the home as a summer aide notwithstanding the fact that by some coincidence she was not actually, physically at work until shortly after the application for certification.

For all these reasons it is respectfully submitted that Joanne Johnston should be retained on the lists for the purposes of the count. To do otherwise would deny her a right to be included in the determination of whether or not the union should be certified without a vote or whether or not a representation vote should be taken.

Outright certification without a vote should not be a consequence of a freak coincidence. There is no question she was hired prior to the application for certification and intended to work at the nursing home for the Summer. Had the application for certification been a few weeks later, there is no question she would have been included on the lists.

That being the case, she should now be included for the purposes of the count."

5. Section 7(1) of the Act provides as follows:

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union of such time as is determined under clause j of subsection 2 of section 92.

6. *In Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840, the Board described its general practice (in applications for certification other than those filed under the "Construction Industry" provisions of the Act) with respect to determining the number of employees in the bargaining unit at the time the application was made (sometimes referred to as the "unit time") as follows:

"14. Although the unit time is determined by the provisions of section 7(1), nothing is said in that section or elsewhere in the Act concerning the method or criteria to be used by the Board in ascertaining the number of employees in the bargaining unit at the material time. The determination as to whether a person is or is not to be numbered as an employee on the date of application is, therefore, left entirely to the discretion of the Board. To ensure consistency and order in its proceedings and with a view to the purely practical difficulties involved, the Board has adopted certain practices and rules of thumb applicable to the various situations which commonly arise in the employer-employee relationship.

15. As an assistance to the Board in arriving at a decision with respect to the number of persons in the bargaining unit, the employer is asked to file with the Board schedules listing its employees. The schedules form part of the reply required under section 7 of the Board's Rules of Procedure. The headings of the schedules are set out below:

SCHEDULE "A"

List (alphabetically arranged) of all employees in the bargaining unit described in the application of the applicant as at the day of , 19 . (Do not include the names of employees that appear in B, C or D.)

NAME	OCCUPATIONAL CLASSIFICATION
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SCHEDULE "B"

List (alphabetically arranged) of all employees regularly employed for not more than twenty-four hours per week in the bargaining unit described in the application of the applicant as at the day of , 19 .

NAME	OCCUPATIONAL CLASSIFICATION
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SCHEDULE "C"

List (alphabetically arranged) of all employees who were not actually at work on the day of , 19 , by reason of lay-off, in the bargaining unit described in the application of the applicant as at the day of , 19 .

NAME	OCCUPATIONAL CLASSIFICATION	DATE OF LAY-OFF	EXPECTED DATE OF RECALL
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SCHEDULE "D"

List (alphabetically arranged) of all employees not previously shown who were not at work on the _____ day of _____, 19____, in the bargaining unit described in the application of the applicant as at the day of _____, 19____.

NAME	OCCUPA- TIONAL CLASSIFI- CATION	LAST DAY WORKED	REASON FOR ABSENCE	EXPECTED DATE OF RETURN
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16. It is convenient to deal with the schedules now in reverse order. The rule of thumb applicable to Schedule "D" is that the Board, at the hearing, determines if the persons named thereon have worked within the month immediately preceding the date of application and have either returned to work within the month immediately following the date of application or are expected to so do. If these conditions prevail the employee concerned is considered by the Board to be an employee for the purpose of the unit count. If all are not fulfilled he is not numbered in the unit count.

17. Where an employee is listed on Schedule "C", he is found to be an employee for the purpose of the unit count if he worked at any time during the month immediately preceding the date of application and is to be recalled or has been recalled within the month immediately following the date of the application. Again, unless both conditions are met, such a person is not counted in the unit (*Bertrand & Frere Construction Co. Limited Case*, File No. 10347-65-R)

(The Board proceeded to rule in that case that persons who, not having been forewarned of any lay-off by their employer, presented themselves at their place of work on the date of the certification application in the reasonable expectation of carrying on their normal employment, must be found to be employees in the bargaining unit on the date they so reported, notwithstanding that they were laid off indefinitely without performing any work on that date.)

7. Thus, to be included as an employee in the bargaining unit for the purposes of the count, a person who was not at work on the date of the application must generally have been at work at some time during the one month period prior to the application date and have returned to work (or have been expected to return to work) within the one month period following the application date. (See also *Irwin Toy Limited*, [1970] OLRB Rep. Dec. 912; *Keynorth Limited*, [1970] OLRB Rep. July 477; *Mobile Cartage and Distributors Ltd.*, [1968] OLRB Rep. Nov. 814; and *West Elgin District High School Board*, [1968] OLRB Rep. July 379.) This longstanding practice of the Board enables the parties to ascertain in advance of the hearing the persons who will be included for purposes of the count (see *Sydenham District Hospital*, [1967] OLRB Rep. May 135). A further reason for the existence of the practice is that it tends to exclude from the count persons who have not been at work during the trade

union's organizing campaign and have not had an opportunity to express their support for or opposition to the trade union (see *Bertrand & Frere Construction Co. Limited*, [1965] OLRB Rep. July 292). As noted in *Sydenham district Hospital, supra*, a person who is found by the board not to be an employee for the purposes of the count through the application of that "rule of thumb" may nevertheless "be considered to be an employee for other purposes" such as seniority rights.

8. Although Ms. Johnston was hired by the respondent prior to the date of this application, it appears to the Board that her first day "at work" was probably June 23, 1981, i.e., the day on which she began to perform work as a Kitchen Aide for which she was remunerated by the respondent, as it is highly doubtful that mere attendance by a person without remuneration at an employer's premises for "two hour orientation procedures" would lead the Board to conclude that the person was "at work" on the day in question for the purposes of the Board's "one month rule". However, it is unnecessary to express a final view on that matter in the instant case as the attendance by Ms. Johnston at the respondent's nursing home for orientation procedures did not occur until after the date of the application. Her only attendance at the respondent's premises in the month prior to the date of the application occurred on April 29, 1981, when she was interviewed as an employment applicant by the Director of Nursing Services. Since that attendance at the nursing home occurred prior to her date of hire by the respondent, it clearly did not constitute being "at work". Thus, the case of Ms. Johnston, who was not at work on the date of the application, does not meet the requirements of the Board's "one month rule" since she was not at work at any time during the one month period immediately preceding the date of the application. Moreover, the exclusion of Ms. Johnston for purposes of the count is justified by the rationale upon which this well established practice of the Board is based. She clearly was not at work during the applicant's organizing campaign; in the absence of attendance at work by Ms. Johnston at some time during the month prior to the application, the organizers of the applicant would in all probability be unable to ascertain her identity with a view to contacting her for organizational purposes or with a view to determining the number of employees who would be included in the bargaining unit for purposes of the count.

9. For the foregoing reasons, the Board, having regard to the agreed Statement of Facts and the written submissions of the parties, rules that Joanne Johnston was not an employee of the respondent in the bargaining unit on May 27, 1981 for the purposes of the count in this certification application.

10. The Board has determined that the applicant's right to certification cannot be affected by the Board's ultimate decision concerning whether Lois McAlpine and Joanne Lynch (or either of them) are to be included in or excluded from the bargaining unit. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on June 9, 1981, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. Accordingly, the Board pursuant to its discretion under section 6(1a) of the Act and pending the final resolution of the composition of the bargaining unit, certifies the applicant as the bargaining agent for all employees of the respondent in The Township of South Marysburgh in the County of Prince Edward, save and except supervisors, persons above the

rank of supervisor, graduate and registered nurses, and office and clerical staff, and pending the final determination of the matters in dispute, excluding as well Lois McAlpine and Joanne Lynch.

12. A formal certificate must await the final resolution of the matters that remain in dispute.

1706-80-U; 1651-80-R Amalgamated Clothing and Textile Workers Union, Applicant, v. Chandelle Fashions Ltd., Respondent, v. International Ladies Garment Workers Union, Intervener.

Certification – Interference in the Trade Union – Two unions conducting organizing campaign – Employer dismissing supporters of both Unions – One union seeking certification under section 7a – Whether section 7a certification appropriate when two unions organizing – Remedial order affecting both unions issuing

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

***APPEARANCES:** E. Shilton-Lennon, Tony Pileggi, Frank Aquino and George Surdykowski for the Amalgamated Clothing and Textile Workers Union; Beth Symes and Len Goguen for the International Ladies Garment Workers Union; M. F. O'Toole and A. Tarka for the Respondent.*

DECISION OF THE BOARD;

I

1. This is an application for certification which was heard together with a series of unfair labour practice complaints. The parties before the Board are: The International Ladies' Garment Workers' Union (the "I.L.G."); The Amalgamated Clothing and Textile Workers' Union (the "Amalgamated"); and Chandelle Fashions Ltd. The main application is that of the Amalgamated, which seeks to be certified as the bargaining agent for the employees of Chandelle. The Amalgamated has also filed a complaint under section 79 of the Act, alleging that on October 21, 1980, two of its supporters, Vittoria Bellissimo and Anna Cipresi, were unlawfully laid off because of their trade union activity. This lay off, it is alleged, is part of a scheme of illegal conduct so serious that the Board should certify the Amalgamated pursuant to section 7a.

2. The I. L. G. also represents some of the employees of Chandelle, and has filed an intervention in the certification application. The I. L. G. has filed its own section 79 complaint alleging that on October 21, 1980, two of its key supporters, Lina Bisogni and Lisa Kronquist, were also illegally laid off. The I. L. G. opposes certification of the Amalgamated pursuant to section 7a. The respondent denies that any of these lay offs was related to the employees' trade union activity, and, like the I. L. G., opposes the application of section 7a.

3. It appeared to the Board initially that the appropriate way to proceed was to hear the two applications in sequence, beginning first with that of the Amalgamated, then turning to that of the I. L. G. It soon became apparent however, that all of the proceedings were inextricably intertwined. The Amalgamated proposed to call *as its witnesses*, the two *I. L. G. supporters* who had been laid off. Similarly, the I. L. G. indicated that it intended to rely upon the lay offs of Bellissimo and Cipresi. All of the lay offs, it was said, were part of a scheme to frustrate the organizing campaigns of both unions. It was argued that the impact on the other employees was cumulative, and that the facts of all four lay offs were relevant to the determination of the employer's motivation. In the circumstances, the Board considered it appropriate to hear all of the evidence together, and to require both trade unions to proceed first, so that the respondent would be in a position to respond to all of the allegations made against it. We could see no real prejudice to the unions by proceeding in this manner, and it would avoid the possibility of inconsistent findings or having to go through the same evidence twice.

4. The hearing in these matters consumed five days, and the Board heard the evidence of a number of witnesses. All of these witnesses were carefully examined and cross-examined, and consequently, the Board had the opportunity to observe their demeanour, consider the consistency of their answers, and judge the plausibility of their various versions of events. We see little point in reproducing the details of this testimony. It is sufficient in our view, if we set out our findings of fact based upon our assessment of the witness's relative credibility. We might note at the outset however, that on crucial points, we do not accept the evidence of Maria diBartolomeo, the Forelady, or Andrew Tarka, the Production Manager. In particular, we do not accept their explanation for the lay off of the union supporters.

5. Before turning to the facts of the case, it may be useful to set out the chronological sequence in which these proceedings developed before the Board. As we have already noted, on October 21, 1980, several employees were laid off. On October 23, 1980 the I. L. C. filed its section 79 complaint. On October 31, 1980 (i.e., after the events which it would later claim made it impossible to ascertain the true wishes of the employees), the Amalgamated filed an application for certification seeking a prehearing representation vote. The Board granted this request and fixed November 28 as the date for the vote. On November 5, the Amalgamated filed its section 79 complaint on behalf of Bellissimo and Cipresi. On November 14 the voters' list was settled at a meeting between the Amalgamated and the respondent. On November 27 the Amalgamated, through its counsel, claimed, without prejudice, that it was entitled to certification pursuant to section 7a. On November 28 the vote was taken. Disregarding the segregated ballots of the grievors in the section 79 matters (which could not affect the outcome in any event) the result of the vote was: 11 employees in favour and 47 employees against the Amalgamated's certification. December 3 was fixed for the first day of hearing into the two union's unfair labour practice complaints.

6. Chandelle Fashions, as its name suggests, is a manufacturer of ladies wear, with factory facilities in the City of Toronto. Its production pattern is cyclical, reflecting the changing seasons and the associated changes in clothing styles. With new lines, patterns, and designs, comes the necessity of setting new "piece rates" for the employees. This process inevitably is finalized. This is what happened in the spring and fall of 1980. Andrew Tarka, the new Production Manager, was considered less responsible to these employee concerns than his predecessor, and it is this which prompted the employees to seek trade union representation.

7. The Amalgamated began organizing at Chandelle in early October 1980. The first

union card was signed on October 3, 1980. The union's principal contact inside the plant was Vittoria Bellissimo who was personally acquainted with Tony Pileggi, a full-time organizer for the Amalgamated. Bellissimo kept in contact with Pileggi throughout the organizing campaign. She gathered names and addresses in the plant, and during coffee breaks and at lunch periods, spoke to other employees about the advantages of supporting the Amalgamated. Since she openly discussed the union with many of the employees, Bellissimo assumed that her support for the union would be fairly well known among the employees in the bargaining unit.

8. Organizing activities were also undertaken by Pileggi and Frank Aquino, another Amalgamated organizer, who called on the employees at their homes in an effort to persuade them to sign membership cards. Progress was slow but steady. Eventually the Amalgamated was able to acquire 31 membership cards from among the some 65 employees then in the bargaining unit. Because of changes in the employee compliment there were some 61 employees in the unit at the time of the certification application, of whom about 26 had signed cards for the Amalgamated.

9. Throughout the same period, the I. L. G. was also attempting to organize the employees of Chandelle. Its campaign started a little later, but followed much the same pattern. Its principal inside contacts were Lisa Kronquist and Lina Bisogni. Kronquist is the wife of the President of the Toronto Joint Board of the I. L. G., and through her husband arranged for the support of several I. L. G. organizers. Because most of the respondent's employees speak Italian, Kronquist enlisted the help of Lina Bisogni, who assisted her throughout the campaign. Together they secured the names and addresses of employees (by selling lottery tickets), spoke to employees in the plant, distributed union cards, and maintained contact with the I. L. G.'s outside organizers. The latter, sought to visit the employees in their homes just as the Amalgamated organizers were doing. Again, the evidence indicates that Kronquist and Bisogni were quite open in their discussions with other employees, and consequently that their support for the union would have been well known to many of the employees in the bargaining unit.

10. Both unions had some success. The Amalgamated started first, and eventually solicited more membership cards; however, the I. L. G.'s claim that it was the most appropriate union to represent workers in the ladies' garment industry also seems to have had considerable impact. Of the some 25 or 26 Amalgamated members who were in the bargaining unit on the date the Amalgamated applied for certification, nine later signed I. L. G. cards, and seven of these signed I. L. G. cards within a few days of having signed an Amalgamated card and before the actual application for certification was made. There is no evidence of any improper conduct on the part of the I. L. G. and it would appear that many of the Amalgamated's early supporters later switched their allegiance. Moreover, the I. L. G. continued its campaign right up to the date of the representation vote, claiming that the Amalgamated was bound to lose, and that the I. L. G. was the best union to represent employees in the ladies' garment industry. This campaign may partly explain the Amalgamated's poor showing in the representation vote. Prior to the vote (excluding the segregated ballots) the Amalgamated had membership cards for only 23 of the employees who subsequently cast ballots, and nine of these have also signed I. L. G. cards.

11. The lay offs on October 21 brought both organizing campaigns to a dramatic halt. The evidence from the organizers for both competing unions was consistent on this point. Persons who were formerly receptive or had indicated they would supply names or other

tangible support for the union, were now no longer interested – in some cases citing a fear for their job security. The Board recognizes that hearsay quality of some of this evidence, but the fact remains that both unions were making some progress prior to October 21, but in the weeks after October 21 neither was able to persuade new supporters to sign membership cards. The Amalgamated contends that the lay off also influenced employees to vote against it in the representation vote.

12. There is no doubt that the respondent was aware of the union's organizing campaign well before the lay offs. Tarka testified that he learned of the presence of a union from a truck driver some time in the week of October 14, and was also told about the union by a cutter as early as October 15. Maria diBartolomeo testified that she learned of the union's organizing campaign on Friday, October 17 when she was telephoned at home by an employee who had been visited by the union. On Monday, October 20, before the commencement of work, two other employees told her that they too had been visited by the union. All of this information was conveyed to Tarka, who told her to keep her eyes and ears open for any further signs of union activity. Tarka suspected, (correctly as it turned out), that the core of union supporters was to be found among the single needle operators. He told the Board that he suspected all of these operators "to a lesser or greater degree", and admits that he and diBartolomeo discussed who might be union sympathizers. He further admits discussing the matter at some length with Arnold Grandili, the Head Cutter. Tarka and Grandili ran through the whole list of employees in an effort to identify union supporters and determine who might be inclined to vote in favour of the union in a representation vote. Grandili identified Lisa Kronquist as a potential supporter, because her husband was an I. L. G. union official; yet Tarka urges the Board to accept his assertion that it "never occurred to him" that anyone in the plant might be a "leader" or particularly active, and he never sought to identify the union's inside organizers. His conduct suggests the contrary, and we simply cannot believe his evidence on this point.

13. The evidence indicates that Maria diBartolomeo followed Tarka's instruction to the letter. That morning (October 21) Vittoria Bellissimo was five minutes late, and was greeted with the rather curious comment "have you been to a meeting". Later diBartolomeo was observed going from machine to machine talking to the operators, then periodically reporting to the office. This pattern of conduct was unusual in that Mrs. diBartolomeo was not bringing work to the operators and taking it away as she normally did. Arnold Grandili was also observed making a rather unusual number of visits to the office. The same day, a number of women approached Lisa Bisogni to tell her that Maria diBartolomeo was inquiring about the union, and whether they had been visited or signed cards. Anna Cipresi (who works beside Vittoria Bellissimo) told the Board that diBartolomeo had asked her not only about her own union support, but also about that of Vittoria and others. On October 21, Lina Bisogni was also subjected to what she considered to be unusual scrutiny. The Forelady seemed to be watching her carefully, and always seemed to be present when she was talking to other employees. That day too, the respondent insisted upon strict compliance with its rule against bringing handbags on the shop floor – a rule which has not been insisted upon before or since. We are satisfied that on October 20, the day before the lay off, Maria diBartolomeo was attempting to ascertain which employees were union adherents, and it would be surprising if the three high profile organizers – Lisa Kronquist, Lina Bosogni and Vittoria Bellissimo – did not come to her attention. All three were laid off the next day together with Anna Cipresi, who not only signed a union card but, perhaps significantly, works beside Vittoria Bellissimo.

14. The activities of diBartolomeo and Grandili were not the only unusual events of

October 20, 1980. That afternoon there was a meeting in Tarka's office attended by diBartolomeo, Grandili, Mr. Hoogenboom, the company Controller, and Mr. and Mrs. Hegendorfer, the respondent's owners. A meeting such as this was unprecedented and was the subject of some comment among the employees. Maria diBartolomeo was not in constant attendance. She left the meeting periodically to speak to various employees and was visibly upset.

15. None of the grievors attended the meeting, but it is admitted that the union was one of the principal topics of discussion. The Hegendorfers were "bewildred, surprised and disappointed" at the prospect of a trade union – a reaction which was similar to that of Tarka, the Production Manager. Once more, the management speculated about who might be interested in supporting the union, and diBartolomeo, Grandili, Tarka and the owners ran through the entire list of employees trying to determine who might be union sympathizers. As we have already mentioned, the very next day the three principal union sympathizers were laid off.

16. The necessity of a lay off was also discussed at the October 20 meeting. Tarka asserts that there was a disparity between the *projected* sales and the actual sales; but the Board was given little indication of the basis for this projection and it is interesting to note that Tarka's concern about over-production is contemporaneous with this first knowledge of the union's organizing attempts. There were no sales data presented to the Board, nor any indication that the company was experiencing financial difficulties. Tarka testified that sales were *up* over previous periods, and in the months immediately preceding the lay off the respondent had hired single needle operators and was continuing to search for employees to work on serging machines. The grievors were busy when they were laid off, and the shelves were full of work yet to be done. None of the cutters was laid off, and there was still overtime in other parts of the plant. Tarka sought to explain this apparent anomaly by asserting that there was a surge of work requiring serging machine operators; but his own statistics do not demonstrate any dramatic shift of product mix and he was only able to pick out three of the respondent's dozens of styles which were done entirely on the serging machine, and three others which were primarily serging. Moreover, in cross-examination he acknowledged that some of the styles which he had identified as being done exclusively on a serging machine had a *single needle piece work rate* associated with them. Tarka also told the Board that the respondent's fall lines were different from its earlier lines in that they had an unusually high preparation of heavily constructed or tailored garments; but on cross-examination he admitted that garments such as these could not be made on serging machines.

17. While the grievors were laid off certain "homeworkers" were not. It is clear from the respondent's own evidence that although homework was reduced somewhat in late fall, these employees continued to work. When the grievors were recalled they observed homeworkers bringing in completed garments. Initially, Tarka testified that some single needle operators had to be laid off because homeworkers were given priority in recognition of their long association with the company. Later however, he told the Board that "the plant comes first". In December, when the grievors were recalled, homework was almost entirely curtailed. Why did the plant not "come first" in October when the grievors were laid off?

18. Tarka testified that the decision to lay off employees was made at the meeting of October 20 but the number and selection of employees was left to him. He made his decision on the evening of October 20 or on the way to work on the morning of October 21. The criteria for selecting those who would be laid off are, to say the least, bizarre.

19. The evidence establishes that lay offs of any kind are extremely unusual at Chandelle. Until at least May or June of 1980 over-production, if it occurred, was dealt with either by cutting back on homework, or by flexible work sharing arrangements. The first real lay off occurred in May or June of 1980 when approximately six employees had to be laid off. At that time it is agreed that the following procedure was used:

1. Homework was reduced or eliminated.
2. The employees who had recently been hired were laid off.
3. The Forelady canvassed workers for volunteers; that is, employees who were prepared to accept a lay off with associated Unemployment Insurance benefits.
4. The remainder of the employees shared the reduced volume of work and participated in a "rotating lay off" scheme in which each employee lost only one or two days work throughout the entire lay off period.

The above described method of accommodating production cutbacks was implemented by Maria diBartolomeo and is consistent with the general industry practice.

20. Tarka had not direct involvement in the June lay off. This, he said, was because he had no personal knowledge of the employees at that time; but on cross-examination, it was apparent that his knowledge was little better in October 1980. Although he suggested that Bellissimo and Cipresi had been chosen because of their lost time or work performance, it was evident that he was entirely unaware of their performance relative to other employees and, such objective evidence as there is before the Board, suggests that the grievors' performance is as good as, or better than, that of other potential candidates for lay off.

21. For the October 21 lay off, Tarka did not consult with the Forelady. He did not consider accommodating the alleged over-production by reducing homework. He did not canvass for volunteers; indeed, an employee who had asked to be laid off was retained, while the grievors who wanted to work were laid off! He did not consider work sharing. Seniority, he said, never entered his mind – despite the fact that the company was anxious to retain the services of experienced single needle operators. He did not even consider the entire list of single needle operators. In cross-examination, he admitted that there were individuals who were not considered who had less experience and less seniority than some of the grievors. Even skill and ability were not key criteria, for, Tarka said, two individuals were struck from his proposed lay off list *because* they had *less* experience than the grievors and would be less likely to complain. The grievors were chosen because they were "complainers" or employees which Tarka thought the company could "do without". They were chosen, he said, because of their "character".

22. There is no doubt in the Board's mind why the grievors were selected for lay off. The individuals on the list were either known to be, or likely to be, trade union supporters. Even Norma Harris who ultimately was not laid off, was a "leader" in complaining about the piece work rates and thus, one who could reasonably be suspected of supporting the union. Having regard to the totality of Tarka's evidence the manner in which it was given and, in particular,

his performance under cross-examination, we are satisfied that we should not accept his explanation for the reason why the grievors were laid off. On the contrary, we find that they were laid off because of their trade union activity.

23. We are fortified in our conclusion that the grievors' lay off had little if anything to do with the respondent's production needs, by the manner in which they were recalled. At the time of their lay off, there was no indication of whether or when they would be recalled. Tarka freely admitted that he would have preferred not to have recalled them at all. As late as Friday, November 28, 1980, counsel for the respondent advised the applicant that the grievors were still on "indefinite lay off" and that there was no immediate prospect for recall. Of course, if they were about to be recalled it is arguable that they would have been entitled to vote. But on the following Monday, the day before the commencement of the unfair labour practice hearing, Tarka instructed Maria diBartolomeo to telephone the grievors to advise them of their recall – even though according to the respondent's own evidence the first week in December was the slowest of the season with work in process at its annual low. The grievors testified that when they returned to work they were much less busy than when they were laid off. We are satisfied that the grievors' recall, like the lay off itself, was not motivated by the respondent's production requirements but rather its assessment of how to deal with the representation vote, and the forthcoming Labour Relations Board hearings.

24. Having regard to the foregoing, the Board finds that Vittoria Bellissimo, Anna Cipresi, Lisa Kronquist and Lina Bisogni, were laid off by the respondent because of their trade union activity contrary to sections 56, 58(a), 58(c) and 61, of the *Labour Relations Act*.

25. On October 24, 1980, three days after the lay off of the unions' key inside organizers, the respondent's owners held a meeting of the employees just before the end of their ordinary work day. This meeting was addressed by the Hegendorfers who discussed both the union organizing campaigns and the employees' terms and conditions of employment. On the basis of the evidence before us, we cannot conclude that the statements made to the employees contravened sections 56 or 61 of the *Labour Relations Act*. They didn't have to. Only three days before the respondent had "even handedly" eliminated the principal proponents of each of the two contending unions. We do not think that this message would be lost on the other employees.

II

26. The Amalgamated contends not only that the respondent has contravened the *Labour Relations Act*, but also that the character of that contravention is so serious, and of such enduring quality, that the Board should issue it a certificate pursuant to section 7a of the Act. It is argued that the employer's unfair labour practices constitute an explicit threat to the job security of all employees who might otherwise be disposed to support a trade union. This conduct, it is argued, justifies the issuance of a certificate despite the fact that its rival was equally wronged, and that at the time of the respondent's illegal conduct a significant portion of the Amalgamated's support was drifting to the I. L. G. As we have already noted, if one disregards the membership cards of employees who left the respondent's employ prior to the application, and if one gives effect to the apparently voluntary change of heart of some of the Amalgamated's supporters (perhaps in response to the I. L. G.'s claim to be the "best" union to represent ladies garment workers), we are left with a situation in which the Amalgamated's

core support does not differ significantly from that of the I. L. G. And, taken together, the support of the two unions barely constitutes a majority of the respondent's employees.

27. The I. L. G. opposes the issuance of a certificate pursuant to section 7a both because of its own support among the employees, and because, it is argued, the Amalgamated cannot apply for a prehearing representation vote, acquiesce in the taking of that vote, then urge that the vote be disregarded and a section 7a certificate be issued instead. The respondent joins the I. L. G. in its "waiver" argument, and also maintains that the preconditions for a certificate pursuant to section 7a have not been met. In order for the Board to accede to the Amalgamated's request we must be satisfied that:

- (a) the respondent employer has contravened the Act;
- (b) the contravention is of such nature that the true wishes of the employees are not likely to be ascertained in a representation vote or otherwise; and
- (c) that the Amalgamated has membership support adequate for the purposes of collective bargaining.

If all these conditions are met section 7a gives the Board the *discretion* to issue a certificate.

28. We do not accept the contention that by requesting and participating in the "prehearing" representation vote the Amalgamated thereby waived its right to subsequently rely on section 7a. There was certainly no express waiver, and even though the section 7a allegations were filed prior to the vote, the Amalgamated agreed only that the ballots should be counted "without prejudice" to its position on the section 7a issues. None of the other parties made any objection to this procedure – perhaps because they, like the Amalgamated, recognized that the result of the vote itself might be relevant to the section 7a matter, and that there were sound practical reasons for conducting the vote, and counting the ballots. If the Amalgamated had been successful, the section 7a request would have been academic, and it would have been unnecessary to engage in what turned out to be protracted proceedings. A "prehearing" vote is precisely that – a vote conducted in advance of a hearing on the issues which may arise on a certification application. One of these is the applicability of section 7a, and we do not think the Amalgamated is precluded from raising it.

29. There is no doubt that the respondent's conduct in this case is of a particularly serious nature threatening employee job security in a manner which would seriously undermine their support for any trade union and prejudice the ability of the employees to freely express their wishes in the November 28 vote. The respondent's careful search for union sympathizers and its subsequent laying off the key supporters for both unions, could convey but one message to the employees. Support for any union might result in their termination. This is precisely the kind of conduct which might justify the imposition of section 7a.

30. The competing policy considerations which underlie section 7a are aptly set out by the British Columbia Labour Relations Board in commenting upon a similar provision in its own statute. In *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited* [1974] 1 Can. LRBR 13 at page 20 the Board observed:

"Certification without a vote creates a real disincentive to the use of these

kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct. Someone who intends to secure a favourable vote from the employees ends up with exactly the opposite result. However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining.”

These considerations are particularly apposite in the present case. Here the Board is faced with a novel situation, for both competing unions have been the object of the employer’s unlawful activity and both organizing campaigns have suffered. Each union had a substantial core of support among the employees prior to the employer’s unfair labour practices, and both found their efforts to organize frustrated. (The I. L. G. has continued its organizing efforts and, it was not until some months later, that it has been able to marginally increase its support.) Only the Amalgamated was able to achieve the bare thirty-five per cent necessary to apply for certification, but even that thirty-five per cent includes a significant number of individuals who, after signing Amalgamated cards, signed a new membership card evidencing support for the I. L. G. It is always difficult to assess the dynamics of an organizing campaign, but on the basis of the evidence before us, it appears to the Board that there was a significant shifting of support towards the I. L.G. This process was occurring well before the Amalgamated’s application or the terminal date, and well in advance of the respondent’s unfair labour practices. In consequence, the I. L. G.’s support cannot be regarded as a mere response to the Amalgamated’s organizing activities. The I. L. G.’s campaign was an entirely independent undertaking, with its own roots, network of supporters, and particular claim to employee allegiance. It may well have matured had the employer’s illegal conduct not intervened. Indeed, the I.L.G.’s claim for certification pursuant to section 7a may be just as strong as that of the Amalgamated, for its campaign was subverted before it could even achieve the bare thirty-five percent required to seek a place on the ballot in a prehearing vote! Section 7a is an extraordinary remedy, and an inauspicious beginning to a bargaining relationship in any circumstances, and surely one should hesitate before invoking that section in the unusual circumstances of this case.

31. In a situation where two competing unions are equally damaged by an employer’s unfair labour practices, both have the support of a significant but minority group of employees and both have a claim to the application of section 7a, we do not think it is appropriate to issue a section 7a certificate to one of them. To do so would be to foist a trade union not only upon a group of uncommitted employees who may or may not want a union, but also upon a group of employees who may well prefer another union. A more appropriate Board response, in our view, is a liberal exercise of our remedial authority under section 79, in order to counteract the adverse impact of the employer’s illegal conduct and restore each of the unions insofar as possible to the position it would have been in had that conduct not occurred. Compensation for the grievors is not sufficient. It will not undo the chilling effect on other employees of the respondent’s unfair labour practices. As the Board noted in *Valdi Inc.* [1980] OLRB Rep. August 1254 at page 1269:

“However, the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have

a significant “chilling effect” on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. The mere reinstatement of the employee directly affected with backpay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist for those occasions where he will not. (Indeed, if the experience in the United States indicating that only a small percentage of NLRB reinstated employees have the courage or will to return to work is applicable in Ontario, our reinstatement remedy may be never less effective than this. See *Stephens and Chaney*, “A Study of the Reinstatement Remedy under the National Labor Relations Act” [1974], 25 Lab. L.J. 31. However, one principal difference between the NLRB and the Board is the greater speed with which remedies may be mobilized and finalized under Ontario’s Labour Relations Act. This factor may be an important difference to the effectiveness of our reinstatement orders.) We would add that our concern for remedial effectiveness is not limited to situations where employers are respondents. Trade unions have important obligations under the statute as well and individual employees who are mistreated by them must also be assured of future lawfulness. One of the unique remedies developed by labour relations agencies to respond to the psychological impact of unfair labour practices requires the offender, whether employer or union, to communicate to employees affected by an unfair labour practice that it has been found guilty of violating statutory labour laws and that it will henceforth conform to their requirements. This remedy, in the usual form of a posting of a notice for sixty days in a conspicuous location(s) in the workplace, was first developed by the Board in *Radio Shack, supra*, although its origin in labour law is ancient. See for example: *The Falk Corporation* [1940], 308 U.S. 453, 5 LRRM 677 at p. 682; *Bradford Dyeing Association* [1940], 310 U.S. 318, 6 LRRM 703 at p. 715. In more exceptional cases the posting of a notice will be insufficient and mailing, publishing, and reading of notices may be directed in order to redress the impact of unfair labour practices in question. See *Radio Shack, supra*, at p. 1270. See also *Comment, Labour Remedies* [1968], 54 Virginia L. Rev. 38 at p. 48. And more generally, *Comment, NLRB Remedies – Moving Into The Jet Age* [1975], 27 Baylor L. Rev. 292. However, we believe the posting of notices should not be confined to exceptional cases because isolated violations of the Act have an undoubted and significant psychological impact on labour relations and the attainment of the statute’s objectives. Making employees aware of the fact that an errant employer or trade union cannot violate the Act and that the employee has meaningful legal rights is vital to the success of *The Labour Relations Act*. Admittedly, the effect of the posting requirement often will be difficult to evaluate but this is no reason for inaction. Surely, for example, the fear for job security will be lessened with the realization that someone more authoritative than the employer has a voice in determining what he can do to those who support a trade union and that someone more powerful than a trade union will

protect those who lawfully oppose it. Even a belated notice is better than none, if it helps to dispel any fears, confusion or ill-will created by a situation which has been equitably resolved.”

32. The instant case calls for a remedy which will redress the damage done to the (competing) organizing campaigns of both unions, and will assure all of the employees that they need not fear termination or lay off because of their association with either the Amalgamated or the I. L. G. Both unions had a legitimate claim to the allegiance of the employees, and it must be clear to those employees that they are free to support either union without fear of reprisal. We recognize that in restoring the situation to what it was prior to the employer's unfair labour practice, we are restoring the parties to a situation in which two unions are aggressively, and to some extent successfully, competing for the allegiance of the respondent's employees. It may be that as a result of this intense rivalry neither union will ultimately be successful in securing majority support. But this is precisely the situation in which they found themselves prior to the respondent's unfair labour practice.

33. Having regard to the foregoing, the Board issues the following remedy:

- (a) The Board declares that the respondent unlawfully has laid off Lisa Kronquist, Lina Bisogni, Anna Cipresi and Vittoria Bellissimo because of their trade union activity, contrary to sections 56, 58(a), 58(c) and 61 of *The Labour Relations Act*.
- (b) The Board directs that the respondent forthwith compensate each of the grievors for all wages and benefits lost during the period when they were unlawfully laid off. Such compensation shall bear interest calculated in the manner set out by the Board in *Hallowell House* [1980] OLRB Rep. January 35. The Board will remain seized of this matter in the event that any dispute arises with respect to the calculation of the amount owing to each of the grievors.
- (c) The respondent is directed to cease and desist from discriminating against union supporters in any manner whatsoever, and, in particular the respondent is directed to refrain from unlawfully laying off or threatening to lay off union supporters.
- (d) The Board directs the respondent to post copies of the attached notice marked “Appendix” after being duly signed by the respondent's representative, in conspicuous places at its place of business where the notices are most likely to come to the attention of the employees in the bargaining unit. The respondent shall keep these notices posted for 60 consecutive days. Reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced or covered by any other material. Reasonable physical access to all such premises shall be given by the respondent to two representatives of each of the two unions involved in this matter, so that they may satisfy themselves that this posting requirement has been and is being complied with.

- (e) The respondent is directed, at its own expense and without comment, to deliver a copy of the attached notice marked "Appendix" after being duly signed by the respondent's representative, to each employee in the bargaining unit.
- (f) The respondent is directed to provide each of the unions forthwith with a list of the names and addresses and telephone numbers (if available) of employees in the bargaining unit, and to keep such list updated from time to time for one year, or until one of the unions has been certified as the employees' bargaining agent, whichever shall first occur.
- (g) The respondent is directed to permit each of the unions access to the respondent's premises during two consecutive lunch periods so that the representative of each union can address the employees. These four lunch period meetings shall take place out of the presence of any member of management and shall alternate between the two unions involved, beginning with the Amalgamated.
- (h) Each union must be given full access to the respondent's bulletin boards or other places in which notices to employees are posted, so that the two unions will be able to post their own literature directed to the employees. Such right of access must continue for a period of one year, or until one of the unions has been certified whichever first occurs.

34. The representation vote conducted on November 28, 1980 is hereby set aside and a new representation vote is ordered. Such representation vote shall not take place until the Board's remedial order has been fully complied with, but in any event, not later than three days after the last lunch hour meeting. The purpose of the representation vote is to give the employees an opportunity to indicate whether or not they wish to be represented by the Amalgamated Clothing and Textile Workers Union. Those entitled to vote will be all employees on the day hereof who do not voluntarily terminate their employment or are not discharged for cause between the date hereof and the date fixed for the taking of the representation vote.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE TO ALL EMPLOYEES IN ORDER TO COMPLY WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD. THAT ORDER WAS MADE AFTER A HEARING IN WHICH ALL INTERESTED PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE UNLAWFULLY LAID OFF LISA KRONQUIST, LINA BISOGNI, VITTORIA BELLISSIMO, AND ANNA CIPRESI CONTRARY TO THE ONTARIO LABOUR RELATIONS ACT. THE BOARD HAS ORDERED US TO COMPENSATE EACH OF THESE EMPLOYEES FOR ALL OF THE WAGES WHICH THEY HAVE LOST AS A RESULT OF THEIR UNLAWFUL LAY OFF. THE BOARD HAS ALSO DIRECTED US NOT TO INTERFERE WITH OUR EMPLOYEES' RIGHT TO JOIN OR NOT TO JOIN A UNION, AND HAS ORDERED US TO INFORM ALL OF OUR EMPLOYEES OF THEIR RIGHTS.

THE ONTARIO LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THE RIGHT:

- (A) TO FORM OR JOIN A TRADE UNION OF THEIR CHOICE;
- (B) TO ENGAGE IN COLLECTIVE BARGAINING CONCERNING THEIR TERMS AND CONDITIONS OF EMPLOYMENT;
- (C) TO REFUSE TO DO ANY OF THESE THINGS.

THESE RIGHTS ARE GUARANTEED BY LAW.

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS.

- WE WISH TO ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT LAY OFF OR DISCRIMINATE AGAINST EMPLOYEES IN ANY WAY BECAUSE THEY WISH TO SUPPORT A TRADE UNION. WE WILL COMPENSATE LISA KRONQUIST, LINA BISOGNI, ANNA CIPRESI AND VITTORIA BELLISSIMO FOR THE MONEY THAT THEY HAVE LOST AS A RESULT OF THEIR LAY OFF.
- IF THE EMPLOYEES CHOOSE A TRADE UNION TO REPRESENT THEM, WE WILL NOT DISCRIMINATE AGAINST ANY EMPLOYEE SUPPORTING THAT UNION, AND WE WILL BARGAIN IN GOOD FAITH WITH THE UNION, AND MAKE EVERY REASONABLE EFFORT TO CONCLUDE A COLLECTIVE AGREEMENT. IF AN UNDERSTANDING IS REACHED, WE WILL SIGN A CONTRACT WITH THE UNION OF THE EMPLOYEES' CHOICE.

CHANDELLE FASHIONS

PER (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

Appendice

Legge sui Rapporti Lavorativi

AVVISO AGLI IMPIEGATI

Affisso per Ordine della Commissione dell 'Ontario per i Rapporti Lavorativi

ABBIAMO PUBBLICATO QUESTO AVVISO A TUTTI I DIPENDENTI PER ADEMPIERE UN ORDINE DELL'ONTARIO LABOUR RELATIONS BOARD. L'ORDINE È STATO EMESSO IN SEGUITO AD UN'UDIENZA, DURANTE LA QUALE TUTTE LE PARTI INTERESSATE HANNO AVUTO MODO DI PRESENTARE I LORO ARGOMENTI. L'ONTARIO LABOUR RELATIONS BOARD HA CONCLUSO CHE LA DITTA HA AGITO ILLEGALMENTE, SOSPENDEDO DAL LAVORO LISA KRONQUIST, LINA BISOGNI, VITTORIA BELLISSIMO E ANNA CIPRESI, CONTRO QUANTO È PRESCRITTO DALLA LEGGE CHE REGOLA I RAPPORTI DI LAVORO, L'ONTARIO LABOUR RELATIONS ACT. IL BOARD CI HA ORDINATO DI COMPENSARE CIASCUNA DI QUESTE DIPENDENTI PER TUTTO IL SALARIO PERSO IN SEGUITO ALLA SOSPENSIONE ILLEGALE DAL LAVORO. IL BOARD CI HA ANCHE DATO DIRETTIVE DI NON IMPEDIRE AI NOSTRI DIPENDENTI DI ESERCITARE IL LORO DIRITTO DI ADERIRE O MENO A UN SINDACATO, E CI HA ORDINATO DI INFORMARE TUTTI I NOSTRI DIPENDENTI CIRCA I LORO DIRITTI.

LA LEGGE "ONTARIO LABOUR RELATIONS ACT" DÀ A TUTTI I DIPENDENTI IL DIRITTO:

- (A) DI FORMARE UN SINDACATO O DI ADERIRE AL SINDACATO DI PROPRIA SCELTA;
- (B) DI CONDURRE TRATTATIVE COLLETTIVE PER QUANTO RIGUARDA I SALRI E LE CONDIZIONI DI LAVORO;
- (C) DI RIFIUTARE DI FARE LE COSE ELENCAE SOPRA.

QUESTI DIRITTI SONO GARANTITI DALLA LEGGE.

NOI NON FAREMO NULLA PER IMPEDIRE IL LIBERO ESERCIZIO DI QUESTI DIRITTI.

- VOGLIAMO ASSICURARE A TUTTI I NOSTRI DIPENDENTI CHE NESSUNO SARÀ SOSPESO DAL LAVORO O CHE RICEVERÀ IN QUALSIASI MODO TRATTAMENTI SFAVOREVOLI SOLO PERCHÉ VUOLE ADERIRE AL SINDACATO E SOSTENERLO. RISARCIREMO LISA KRONQUIST, LINA BISOGNI, ANNA CIPRESI E VITTORIA BELLISSIMO DEL DANARO CHE ESSE HANNO PERSO IN SEGUITO ALLA LORO SOSPENSIONE DAL LAVORO.
- SE I DIPENDENTI SCEGLIERANNO UN SINDACATO CHE LI RAPPRESENTI, NOI NON TRATTEREMO IN MODO DIVERSO DAGLI ALTRI DIPENDENTI COLORO CHE DECIDERANNO DI ADERIRE AL SINDACATO, E NEGOZIEREMO IN BUONA FEDE CON IL SINDACATO, E FAREMO OGNI RAGIONEVOLE SFORZO PER GIUNGERE AD UN ACCORDO PER UN CONTRATTO COLLETTIVO. SE SI GIUNGERÀ AD UN ACCORDO, NOI FIRMEREMO IL CONTRATTO CON IL SINDACATO SCELTO DAI DIPENDENTI.

CHANDELLE FASHIONS

FIRMATO (RAPPRESENTANTE AUTORIZZATO)

**Questo è un avviso ufficiale della Commissione e non si
deve rimuovere o sfregiare.**

Questo avviso deve rimanere affisso per 60 giorni di lavoro consecutivi.

**0801-81-M United Brotherhood of Carpenters and Joiners of America,
Local Union 446, Applicant, v. Eton Construction Limited, Respondent**

**Construction Industry – Damagès – Section 112a – Employer violating sub-contracting
clause – Assessment of damages**

BEFORE: E. Norris Davis, Vice-Chairman and Board Members C. A. Ballentine and C. G. Bourne.

***APPEARANCES:** Douglas J. Wray and Matti Rissanen for the applicant; Peter Fletcher and Peter Funduk for the respondent.*

**DECISION OF VICE-CHAIRMAN E. NORRIS DAVIS AND BOARD MEMBER
C. A. BALLENTINE; July 30, 1981**

1. This is an application under section 112a for arbitration of a contract grievance arising out of a collective agreement between the parties.
2. The applicant seeks a declaration that the respondent violated Article 4.01 of the collective agreement in sub-contracting work, falling within the ambit of the agreement, to an employer who was not bound by this collective agreement. The application also seeks damages claimed to flow from such violation.
3. There is no dispute but that the work which gave rise to the grievance was work falling within the collective agreement.
4. Mr. Matt Rissanen, Business Representative of the Local testified that he was present at the job site (an extension to a shopping mall) on June 30, 1981, observed two persons doing carpentry work and, on inquiry of them, was told they were employed by Rili Construction. Rissanen testified that Rili Construction was not a party to a collective agreement with the applicant. Rissanen spoke to Mr. Funduk, the respondent's job superintendent and advised him that there was no collective agreement with Rili, to which Rissanen stated Funduk "seemed surprised". Rissanen thinks Funduk then undertook that if Rili was not under union contract he would "get rid of them". In any event the job was completed by a member of the applicant directly employed by the respondent.
5. On July 7, 1981 Rissanen again spoke with Funduk to advise him the union was seeking compensation in respect to the work done by Rili and asked how much work had been done by non-union men. Funduk responded that there had been two men working for six days and that no compensation would be paid. Rissanen then wrote to Funduk on July 8, 1981 claiming compensation of \$1,540.80, which figure he arrived at by applying the hourly total compensation figure (i.e. hourly rate, vacation pay, holiday pay, Health and Welfare contribution, and Pension contribution) appearing in Article 6, schedule D of the collective agreement. Rissanen accepted Funduk's response of the previous day to establish that there had been 96 hours of work which should be paid at this rate.
6. Mr. S. Funduk, Job Superintendent testified that work on the job site commenced in September 1980 and first hired carpenters in late October building up to a peak employment of 12 carpenters through February 1981 when he started laying off and ultimately retained

four carpenters. He stated he had met Rissanen in the parking lot in early June and was asked if the respondent was contemplating lay-offs. Funduk asked if Rissanen was short of men and Rissanen confirmed that. Funduk then told Rissanen that he intended to retain the three carpenters he then had for another four to six weeks. He stated it was then his intention to do the work giving rise to this grievance with these three carpenters; however, two of these three quit, one on June 5th and one on June 12th. As a result Funduk stated he was then forced to sub-contract carpenter work to Brunswick Drywall, a sub-contractor in the job who was then employing about 20 carpenters. Funduk stated that the sub-contracting arrangements with Brunswick came to an end on June 28th or early July because Brunswick "could no longer handle it".

7. Funduk stated that he entered into an arrangement on a time and material basis with an Elois Renault acting through Rili Construction and that he was aware at the time that Renault was acting as a contractor. Funduk stated that before Renault started on the job on June 18th, Funduk had asked him if he was a union member and received an affirmative reply and also a statement that another person Dumont Percy who would be working was a union member. Funduk stated he never questioned whether Renault had a collective agreement with the applicant and that he, Funduk, had not during the month of June 1981 applied to the union to be supplied with carpenters. He stated Renault and Percy did not come on the job through the union office.

8. Funduk stated Rili Construction started on the job on June 18th with Renault and Percy. Percy quit on June 23rd or 24th and Renault then worked alone for two days at which time Renault brought in another employee. Renault "pulled out June 26" and brought in another carpenter and they worked until June 30th "when Rissanen pulled them off the job." Rissanen testified that the two men he observed on the job on June 30th were not union members.

9. Funduk stated that when he had told Rissanen that there had been two "non-union" men working for six days he was really referring to the total work performed through Rili Construction and that his records showed that there had been 48 hours put in by Renault and Percy and 47 hours by the two other carpenters. No records were produced to establish how much money had been paid by the respondent to Rili or in respect to hours worked by individuals. Funduk stated that the particular work which was being done as of June 30th probably started on June 23rd and that 47 hours of work on that job was done by those persons working June 30th and an additional 16 hours of work done by Renault and/or Percy.

10. The Board is satisfied that the arrangement with Rili Construction was in violation of Article 4.01 of the collective agreement. The respondent argued that Renault was not a contractor but "hired by the hour". In our view the evidence of Funduk is clear the respondent considered the arrangement one of sub-contracting, and was aware that Renault was acting as an employer in the hiring of Percy and subsequently, two others. Further, the total lack of effort by the respondent to even ascertain the availability of union members at the time of making the arrangement with Renault (as it is required to do pursuant to Article 5 of the agreement), the fact that Renault did not come on the job by a referral from the union, and the fact that the respondent did not consider the terms of the collective agreement applicable, can only fortify the conclusion that Renault was considered to be and was in fact acting as an employer.

11. As to the union's claim for compensatory damages we consider it to be now well-established that the appropriate redress of a complaint such as is before us includes payment by the employer of an amount equal to the contributions to various trust funds, which would have accrued to members of the applicant who would have been employed by the respondent save for the respondent's violation of the collective agreement. See *Labourers International Union of North America, Local 506 and Napev Construction Limited* [1980] OLRB Rep. February 260. As was said by the Board in that case, at paragraph 8,

"We find support for the relief granted in this case in the similarity of its situation with that in *Re McKenna Brothers Ltd. and Plumbers Union, Local 527*, 10 LAC (2d) 273 (Shime). In that case the arbitrator was dealing with a construction industry employer who, in employing persons other than members of Local 527 to do its work, has violated the hiring clause of the collective agreement between them and the arbitrator awarded compensatory damages to the union in the form and amount of wages and contributions to trust funds which would have been paid to members of the union had there been no breach of the agreement. In the words of that decision, "The company is in breach of the collective agreement and by this breach it has deprived the members of the union of earnings which it has paid to non-union members, . . . Accordingly, the only way to place the injured party in the same position is to make a monetary award in that amount." In so doing, the arbitrator was following the decision of the Ontario Court of Appeal in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, 57 DLR (3rd) 199. That decision set aside a judgment of the Divisional Court and restored the award of the board of arbitration which had awarded sums of money to the union for lost earnings of its members who had been available but not hired to do work which had been done by persons who were not members of the union, as well as for breaches of the vacation pay and welfare provisions of the collective agreement."

12. The respondent in the instant case argued that since Renault and Percy were members of the applicant at the time of working for Rili Construction, that no damages have been suffered by the applicant in respect to the hours worked by those two individuals, and that the Board should restrict itself to considering only those hours worked by other than those two individuals as representing what is required to place the applicant in the same position as it would have been had there been no violation of the agreement.

13. In our view the membership status of Renault and Dumont in the instant circumstances is incidental inasmuch as it was not pursuant to such status that employment was acquired nor were the terms and conditions of employment those provided under that agreement. The union has a responsibility to all its members to maintain the integrity of the distribution of job opportunities available through the collective agreement, and to ensure the application of the terms and conditions of employment established in the collective agreement in respect to its scope of coverage. Had the respondent here complied with Article 4.01 and sub-contracted to an employer bound by the collective agreement, that employer bound by the collective agreement, that employer would have been obligated to have complied with Article 5.01(a) and (b) of the agreement and hired employees through the offices of the applicant by

way of a referral slip issued by the applicant, and the terms and conditions of employment would have been governed by the collective agreement. To accept the respondent's argument is to conclude that the employer in its contravention of the agreement can effectively obliterate the union's rights and responsibilities in the distribution of employment opportunities on whatever basis the collectivity within its own structure has decided to be appropriate, and to leave the terms and conditions unenforceable under the agreement. By by-passing the referral slip system the employer has deprived those union members who would have been entitled to referral to the specific job opportunities to which they were entitled. The happenstance that in this particular case the lost job opportunity was lost to one who also had status as a union member seems to us to be irrelevant. The total terms and conditions of employment as set out in the collective agreement did not apply to the employment of these persons, but rather their contract of employment was determined solely by whatever arrangement entered with Rili Construction who is a stranger to the collective agreement. These persons were employed completely outside the collective bargaining relationship and, not in consequence of any "union member status" and the impact on the union in respect to lost job opportunities is of the same order as if those persons had had no "union member status".

14. Rissanen testified that union members were available for referral through the referral slip system at the time the respondent entered into its arrangements with Rili Construction. The union relied on Funduk's July 7th admission that the work involved two men for six days, which the union calculated as 96 hours. Funduk's testimony was that there was a total of 97 hours work performed by Rili Construction. The applicant's claim for compensation in the amount of \$1,540.80 should be allowed.

DECISION OF BOARD MEMBER C. G. BOURNE.

The decision of Board Member C. G. Bourne will follow at a later date.

0561-81-R International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), Applicant, v. **Gabriel of Canada Limited**, Respondent, v. United Steelworkers of America, Intervener.

Build Up – Representation Vote necessary – Whether vote delayed until half of projected work-force hired – Projected work-force reaching full complement in 4 years and one-half complement in one year – Degree of certainty of employer's plans considered

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *H. Carl Anderson and Howard Powers for the applicant; Richard M. Lyon, Brian A. Bennett and Thomas L. Skinner for the respondent; Hugh G. Mackenzie and Joseph Ginty for the intervener.*

DECISION OF THE BOARD; July 31, 1981

1. This is an application for certification by both the U.A.W. and, by way of intervention, by the United Steelworkers of America.

• • •

7. No one disputes that the Board should order the taking of a representation vote to determine which union, if any should become the exclusive bargaining agent for the employees in the bargaining unit.

8. The respondent company, however, contends that the vote should be delayed because of a planned build-up in its work force.

9. In *F. Lepper & Son Ltd.*, [1977] OLRB Rep. Dec. 846 at 847 the Board set out the rationale behind the Board's practice of delaying the resolution of an application for certification where there is a planned, imminent build-up in the respondent's work force:

In deciding whether to postpone the taking of the representation vote because of the respondent's planned build-up of its work force, the Board must balance the rights of the 28 employees already employed at the time of the application with the rights of future employees the respondent intends to hire over the next eight months. By delaying the vote, the existing employees are temporarily deprived of their opportunity to engage in collective bargaining. By ordering an immediate vote, however, the future employees would be deprived of their opportunity to participate in the selection of their own bargaining agent.

The Board then surveyed the criteria applied to balance the interests of the two groups at pp. 847-848:

Over the years the Board has developed some guideposts to assist it in the balancing of the rights of these two groups of employees. *Firstly*, the

Board requires that there be a real likelihood that a build-up will take place; there must be a firm plan for an imminent build-up. (See *Power Controls* [1967] OLRB Rep. Mar. 954, *Cameron Packing Inc.* [1972] OLRB Rep. Nov. 988, and *Canron* [1967] OLRB Rep. Sept. 750.) As well, the actualization of the build-up must be relatively certain. It should not, in other words, be dependent on market factors well beyond the control of the employer. In *Travelaire Trailer Mfg. Ltd.*, [1970] OLRB Rep. Nov. 829, for example, the Board ruled that the planned build-up was not sufficiently firm to delay the vote because the build-up was almost totally dependent on the unstable market conditions in which the respondent's industry was engaged. The Board made a similar ruling in *Cameron Packaging Inc.*, (*supra*), where the projected build-up was dependent on the next year's market and competitive conditions. *Secondly*, the planned build-up must take place within a reasonable period of time. While each case must be decided on its own facts, we note that in *Vulcan Equipment*, [1974] OLRB Rep. May 285, a build-up over a period of seven months was allowed; in *United Asbestos*, [1974] OLRB Rep. April 234, a build-up over a period of some sixteen months was allowed. In *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637, on the other hand, a build-up spanning between one and five years was not allowed. *Thirdly*, to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If less than fifty per cent of the expected total are then employed, it is normally felt that the group is not sufficiently representative and that the application is therefore premature. (See *B. F. Goodrich Canada Limited*, [1970] OLRB Rep. Sept. 655; *Cornwall Spinners*, [1975] OLRB Rep. Sept. 693.) *Fourthly*, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application. (See *Ford Motor Co.*, [1967] OLRB Rep. Dec. 858, *Cornwall Spinners*, (*supra*) and *Sparton Tool & Mould Ltd.*, [1975] OLRB Rep. June 469.)

10. In this case the Board is satisfied that the respondent has firm plans for an immediate build-up. They further have existing plans for the build-up to continue over a five year period. The projected increases in the respondent's work force may be summarized as follows:

June 1981	53 total employees
July 1981	78 total employees
January 1982	170 total employees
July 1982	213 total employees
1983	318 total employees
1984	368 total employees
1985	468 total employees

Each of the representative employee classifications has been filled since June, 1981.

11. Counsel for the respondent contends that a representation vote taken anytime in 1981 will not be sufficiently representative of the wishes of its ultimate workforce to be appropriate. Instead, counsel maintains that the vote should be taken in July 1982 when close to half of its total projected workforce will be in place.

12. On cross-examination Mr. Brian Bennett, the vice-president of manufacturing at the respondent's plant, acknowledged that while the company had planned to hire 45 people on June 15, 1981 it in fact hired fewer than that. By way of explanation he stated that the company had encountered temporary problems in moving the business from a plant in Saco, Maine to its new plant in Ingersoll, Ontario.

13. At its Ingersoll plant the respondent will be manufacturing McPherson struts and shock absorbers. The respondent has entered into a contract with Volkswagon of America to supply at least 80 per cent of their struts. It is apparent on the evidence that over the next few years the major portion of the respondent's production will be directed to supplying struts to Volkswagon. Bennett testified that the respondent's production capacity will be increased in 1982 in order to meet Volkswagon's rising needs. Bennett explained that Volkswagon's need for struts will increase in 1982 with the opening of a second plant in Michigan. The projected opening date for that plant was not given in evidence.

14. It is apparent to the Board that to a significant degree the respondent's expansion plans are dependent on the success of Volkswagon, the number of cars it makes and the opening of a new Volkswagon plant.

15. In 1982 the respondent intends to commence defense related production. Further it has committed itself, as part of the terms of its 5 year loan, to enter into a full scale employee training program. The respondent has made careful estimates of the growth in its manpower needs and has thus created firm plans to increase its workforce over the next 5 years.

16. Notwithstanding these factors the Board is not prepared to consider as relevant to this application any projected build-up beyond January of 1982. In reaching this conclusion we are guided in part by the substantial extent to which the respondent's production is tied to the fortunes of a single company and the projected opening, sometime in 1982, of another Volkswagon plant. The respondent may be able to accurately predict how many struts it needs to produce for each Volkswagon car; it may also be able to predict the production level of Volkswagon's existing plant. The respondent, however, has no control over the success of Volkswagon and whether in fact it opens a new plant. No evidence was presented to the Board regarding the stability of Volkswagon's plans.

17. In reaching its conclusion the Board is further mindful of the high level of total support the two unions enjoy among the employees at the present time. Additionally we note that the first planned increase in June did not take effect as planned. While the problem responsible for that may be over, the respondent's circumstances, when viewed as a whole, satisfy the Board that the reasonable period of build-up to be considered by the Board in this case is up until January 1982.

18. The respondent's evidence indicates that fifty per cent of the workforce that is projected for January of 1982 will be employed as of August 1, 1981. The Board has concluded thereby that as of August 1, 1981 a representative group of employees will be employed by the respondent for the purposes of the taking of a representation vote.

19. Accordingly, the Board orders that a representation vote be taken forthwith among the employees in the bargaining unit. All employees of the respondent in the bargaining unit on August 1, 1981 who do not voluntarily terminate their employment or who are not discharged for cause between August 1, 1981 and the date the vote is taken will be eligible to vote.

20. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener or no union in their employment relations with the respondent.

21. The matter is referred to the Registrar.

1303-80-M, 1304-80-M, 1305-80-M, 1306-80-M, 1307-80-M, 1308-80-M, 1309-80-M, 1310-80-M, 1311-80-M & 1776-80-U Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, Applicants, v. **Interior Systems Contractors' Association of Ontario** et al., Respondents; **Interior Systems Contractors Association of Ontario**, Complainant, v. Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, Respondent.

Arbitration – Duty to Bargain in Good Faith – Section 112a – Whether employer required to pay for materials – Previous collective agreements and past practice sought to be introduced – Whether agreement ambiguous – Whether admissible – Whether silence during bargaining creating misrepresentation

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *A. Minsky, M. Zigler and M. K. Weller, for the applicants/complainant; D. F. Hersey and F. Lavalley for the respondent/complainant I.S.C.A.*

DECISION OF THE BOARD; July 24, 1981

1. By a decision dated March 17, 1981 the Board consolidated a series of applications filed under section 112a of the Act and a complaint filed by the respondent/complainant, Interior Systems Contractors Association, (hereinafter referred to as I.S.C.A.).

2. The union alleges that the respondents have violated the collective agreement in effect from May 30, 1980 through April 30, 1982 by failing to provide and/or pay for the screws and nails used by drywall applicators working under the collective agreement. Against the union, I.S.C.A. complains that the union bargained in bad faith during the 1980 negotiations which resulted in the collective agreement now in effect between the parties.

I.S.C.A. further complains that the union engaged in a wrongful stoppage of work contrary to *The Labour Relations Act* and seeks damages by way of compensation.

3. At the commencement of the hearing the parties agreed to the following statement of fact:

From and after May 30, 1980 and continuing to date each respondent named in each section 112a referral has at some time not supplied without charge and/or has not paid for and/or has not reimbursed employees engaged on a piecework basis for costs of the drywall screws and nails used by such drywall applicators who perform such drywall application with such screws and/or nails in the performance of their work for the said respondents in residential construction. Where the respondents have provided such screws and nails to such persons the respondents have deducted for the costs thereof from weekly earnings of such employees and/or the said respondents have required these employees to provide drywall screws and nails in respect of their work for the respondents without reimbursement or payment from the respondents for the screws and nails.

4. The parties further agree that the applicant union, Local 675, is the successor to the Wood, Wire and Metal Lathers International Union, Local 562. Local 562 was a party to the predecessor agreement effective April 30, 1977 through April 30, 1980.

5. The following sections of the various collective agreements between the parties and amendments thereto are relevant to the determination of the issues before the Board:

From the collective agreement in effect between the parties from April 30, 1977 to April 30, 1980:

JOURNEYMEN WAGE

7.01 The *hourly wage* rate for journeyman shall be as per the following schedules:

[schedules omitted]

7.03 Employees applying drywall gypsum board and insulation to wood frame construction in the residential construction sector only are exempt from the terms of this agreement.

[emphasis added]

From the first amending agreement to the 1977 - 1980 collective agreement, such amending agreement dated June 5, 1978:

2) — The full terms and conditions of the same said Collective Agreement shall remain in full force and effect in so far as the residential construction sector with the following amendments thereto.

- 3) — Commencing on the signing date of this amendment, employees engaged in the erection or installation of gypsum drywall board and drywall taping may be paid in accordance with the following minimum schedule of *piece work rates*.

Drywall Board Applicators Tapers

On Signing	\$62.00*	\$70.00*
May 1, 1979	\$64.00*	\$72.00*
Nov. 1, 1979	\$65.00*	\$75.00*

* — Amounts refer to 1,000 sq. feet of material applied.

- 4) — *Drywall board applicators engaged on a piece work basis are required to supply screws and drywall tapers are required to supply the necessary materials.*

[emphasis added]

From the second amending agreement to the 1977 - 1980 collective agreement, such amending agreement dated October, 1978:

Article 7.03 of the Collective Agreement is hereby deleted and replaced with the following new article 7.03:

- 7.03 The employer members of the Association and Independent Employer signatory hereto hereby agree that the full terms and conditions, of this agreement including recognition and Union Security apply to the *wood frame residential* construction sector, including single and semidetached houses, row town houses less than four stories and any other like residential construction.

A new article 7.04 is hereby added to the Collective Agreement as follows:

- 7.04 Employer shall pay employees engaged in the above described article 7.03 in accordance with the following schedule.

	Drywall Application	Taping	Insulation
On Signing	\$52.00*	\$60.00*	\$34.00*
May 1, 1979	\$54.00*	\$62.00*	\$35.00*
Nov. 1, 1979	\$56.00*	\$64.00*	\$36.00*

* — Amounts refer to 1000 square feet of material erected and completed.

A new article 7.05 is hereby added to the Collective Agreement as follows:

- 7.05 *Drywall board applicators engaged on a piece work basis are required to supply screws and nails and drywall tapers are required to supply the necessary materials.*

[emphasis added]

From the existing collective agreement effective May 30, 1980 to April 30, 1982:

6.02 The parties hereto agree that gypsum board drywall applicators may be paid on a remuneration related to production (piece work) basis on residential construction only in accordance with the following schedules. Rates mentioned herein refer to one thousand square feet of drywall applied and substitute for any other monetary clause herein.

	Apartment Buildings	Benefits
(metal Furring)		
May 1, 1980	\$68.00	\$7.00 per thousand
May 1, 1981	\$75.00	\$7.00 per thousand
Nov. 1, 1981	\$80.00	\$7.00 per thousand

WOOD FRAME RESIDENTIAL CONSTRUCTION INCLUDING SINGLE AND SEMI DETACHED HOUSES AND ROW TOWN HOUSES.

		Benefits commencing Dec. 1, 1980
May 1, 1980	\$60.00	\$7.00 per thousand
May 1, 1981	\$65.00	\$7.00 per thousand
Nov. 1, 1981	\$70.00	\$7.00 per thousand

ARTICLE 16 — SAFETY

16.01 *Foreman, journeymen and apprentices shall supply themselves with and wear at all times on the job, an approved safety helmet, safety shoes and safety glasses when required. All other safety devices and equipment shall be supplied by the employer.*

...

ARTICLE 17 — TOOLS

17.01 *The employee shall supply himself with the following kit of tools: 1 suitable metal or wooden tool box; 1 set of nippers; 1 pair of No. 8 Tin Snips; one hammer; one gyproc axe; 1 pair of aircraft snips; 1 magnetic nail holder; 1 pocket rule, 12 feet minimum; 1 50 foot measuring tape; 1 plum bob and chalk line; 1 medium size level; 1, 3/4 inch cold chisel; 1 centre punch; 1 adjustable hacksaw; 1 utility gypsum knife, 1 key-hole gypsum saw; 1 tool pouch; 1 screw gun; 1 one-hundred-foot extension cord.*

- 17.02 All other tools and equipment are to be supplied by the employer. In case of breakdown of the employee's screwgun the employer shall make available a temporary replacement for one (1) week only.

[emphasis added]

[NOTE: The 1980 - 1982 collective agreement contains no provision related expressly to the supply of screws and nails.]

6. The 1977 - 1980 collective agreement was an all sector agreement covering both the industrial, commercial, institutional (ICI) sector and the residential sector. It excluded, though, from the residential sector, low rise residential. Pursuant to section 7.01 of the 1977 - 1980 collective agreement persons working in the drywall and acoustics field were paid an hourly rate.

7. It is apparent on the evidence that problems developed with the hourly rate method of payment. Accordingly, the 1977 - 1980 collective agreement was amended so that employees engaged in drywall work would from that point forward be paid piece work rates in accordance with the schedule set out in the amending agreement. Clause 4 of the amending agreement further stipulated that "drywall board applicators engaged on a piece work basis [would be] required to supply screws . . .". While drywall applicators working piece work had previously supplied screws and nails, this was the first time it had been set out as an obligation in the collective agreement.

8. Before long the parties further amended the 1977 - 1980 collective agreement. Through a second amending agreement the parties agreed to extend the coverage of the collective agreement to wood frame or low rise residential which had until that point been excluded. Article 7.04 of the collective agreement was amended to provide piece rates for drywall applicators engaged in low rise residential. A new article, 7.05, was added stipulating in explicit terms that such "drywall board applicators engaged on a piece work basis [would be] required to supply screws and nails . . .".

9. The issue before this Board is whether today, under the successor collective agreement, employees engaged in drywall work are still required to pay for their own screws and nails.

10.p Notice to bargain was given by the successor union, Local 675, to I.S.C.A. on March 4, 1980. In the proposal the union submitted to I.S.C.A. the union included a piece work provision which was to be tied in to hourly rates. The union did not include any reference to the two provisions in the two amending agreements which required employees to supply their screws and nails.

11. It is apparent on the evidence that through its deliberate silence on this issue the union intended to place on the employer the obligation to supply the screws and nails. Mr. Harold K. Weller, Business Representative, testified that union officials had agreed that the union would not raise the issue in bargaining. Weller explained the union's position by saying that they felt that if the issue was of such concern to the employers then they would leave it to them to raise it and to propose, if they saw fit, that it be included once again as a term of the

agreement. Weller candidly acknowledged that the union was pursuing a strategy of non-discussion in the belief that if the collective agreement was silent on the issue the employer would assume the obligation of supplying screws and nails.

12. The collective agreement that was ultimately signed by the parties, unlike the previous amending agreement, contains no explicit reference to the supply of or payment for screws and nails. As soon as the parties ratified the collective agreement the union declared that employees were no longer under an obligation to supply them.

13. A series of union and employer meetings occurred on June 17th and 18th of 1980. June 16th was the strike deadline for employees performing work in the I.C.I. sector. Employees engaged in residential work, however, had by that time become bound by the collective agreement in issue in this case and were thus under an obligation to perform work. Because some projects were simultaneously engaged in both I.C.I. and residential work, employees were highly confused over where they could and could not work. Mr. A. Simone, Business Manager, testified that in addition to this confusion employees were complaining that the employers were not supplying screws and nails for the residential work as in their view they were obligated to do under the new collective agreement. It is apparent that some employees, though the evidence does not reveal who, declined to work until the matter was resolved.

14. To clarify each of these issues the union called a series of meetings to be attended by employers and their employees over the course of June 17th and 18th. The union then explained to small groups of employers and employees the significance of the I.C.I. and residential distinction and the significance of bargaining for separate collective agreements. Both Simone and Weller further testified that the union told the employers that no material charges were to be deducted for screws and nails from the gross amount due to employees pursuant to the rates established under the collective agreement. As each group ended its meeting the employees working under the instant collective agreement returned to work.

15. Counsel for the union argues that it is the natural obligation of employers to supply materials. For employees to become obligated to bear some or all of this responsibility, counsel contends, the obligation must be spelled out explicitly in the collective agreement. As the collective agreement is silent on the matter of who should supply the screws and nails, it is the union's position that the responsibility falls to the employer. Counsel maintains that silence cannot provide the foundation for imposing a positive obligation on the employees. While counsel for I.S.C.A. argues that the Board should look to past practice to interpret this agreement, counsel for the union, citing *Standard Bread* (1963), 13 L.A.C. 377 (Thomas) for support, maintains that silence does not create an ambiguity to open the way to the application of past practice.

16. In further support for this position counsel for the union points to sections 16 and 17 of the collective agreement. Section 16 requires foremen, journeymen and apprentices to supply their own safety helmets, safety shoes and safety glasses. It further stipulates that all other safety devices and equipment are to be supplied by the employer. Similarly section 17.01 itemizes tools that each employee is obligated to supply such as a tool box, a magnetic nail holder, a hammer, an extension cord and a screw gun. Section 17.02 recognizes the employer's obligation to supply all other tools and equipment.

17. On the basis of these provisions counsel contends that the collective agreement was

addressed the matter of the employees' obligation to supply. He argues, pursuant to the principle of contract interpretation, *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another), that because the collective agreement has itemized what things employees are to supply it is appropriate to conclude that the intention apparent on the face of the agreement is that they need not supply anything else.

18. Referring to the negotiating history counsel emphasized the stark change that took place from the provisions of the 1977 - 1980 collective agreement to the 1980 - 1982 agreement. The 1977 - 1980 agreement, as amended, explicitly provided that the employees supply their own screws and nails. Those provisions and any explicit reference to this obligation was eliminated in the existing collective agreement. Counsel for the union argues that the parties must be taken to be negotiating from the immediate past collective agreement and that this omission, viewed together with articles 16 and 17 and the collective agreement's silence on the obligation to supply screws and nails leads, inevitably, to the conclusion that under this collective agreement employees are no longer obligated to supply their own screws and nails.

19. In the respondent's argument counsel emphasized that throughout the history of the drywall industry drywall applicators on piece work have supplied their own screws and nails. I.S.C.A. contends that for the union to remain silent on the issue of the supply of screws and nails throughout negotiations and to seek through that silence to dramatically change the industry practice constitutes bargaining in bad faith. I.S.C.A. maintains that nothing was said or done during negotiations to cause I.S.C.A. to believe that the old practice would not be continued. Counsel asks the Board, therefore, to find that the union's "ploy" or their bargaining strategy was carried out in breach of section 14 of the Act.

20. In addition to alleging that the union bargained in bad faith, counsel for I.S.C.A. asks the Board to find that because the union did not raise the matter of screws and nails in bargaining and voice its position concerning the legal effect of the wording of the memorandum of settlement, it is now estopped from so doing.

21. Regarding the interpretation of the collective agreement counsel for I.S.C.A. argues that section 6.02 of the collective agreement setting out the wage rates is ambiguous and should, accordingly, be interpreted in a manner consistent with past practice. More specifically he argues that the word "applied" in section 6.02 ("Rates mentioned herein refer to one thousand square feet of drywall *applied* . . .") is ambiguous because it does not answer the question of who is to pay for the materials that are required in the application of the drywall. Instead, he maintains, the article simply answers what money flows to the applicator once the drywall is up.

22. Counsel for the respondent further argues that the second amending agreement to the 1977 - 1980 collective agreement should be given no persuasive weight in interpreting the existing collective agreement because it virtually "sat on the shelf" for two years without being applied. In contrast to this assertion, however, we note the uncontradicted evidence of Mr. Simone that the terms of the 1977 - 1980 collective agreement as amended by the second amending agreement relating to houses were applied by some, though clearly not all or even a majority, of the employers. As well there seems to be no question that the first amending agreement relating to apartments was fully applied.

23. Finally it is the position of I.S.C.A. that work stoppages which occurred on June 17th and 18th were illegal work stoppages in violation of the collective agreement.

24. The Board cannot conclude on the evidence that the union's conduct during negotiations was in breach of section 14 of the Act. The employer in this case must be taken to have been aware of the terms of the preceding collective agreement upon which the union's proposals were based. The piece rate provisions and schedules were contained in the two amending agreements. To evaluate the union's new piece rate proposals the employer would have to have had regard to, for the purposes of comparison, the two amending agreements as well as the original collective agreement. In any event, in responding to the union's proposals the employer, in the Board's view, had the responsibility for knowing the terms of its collective agreement, as amended, and for evaluating the effect of the union's proposals on that agreement, including the effect of leaving articles from the preceding agreement out of the proposed agreement.

25. No one gave evidence for I.S.C.A. The Board therefore has no evidence upon which to conclude that the employer was in fact misled by what they have characterized as the union's "ploy". It may be, in fact, that I.S.C.A. understood that the union's proposals were silent on the issue of the obligation to supply screws and nails and decided it was in I.S.C.A.'s best interest for them to remain silent too. Perhaps both parties were content during bargaining to dispose of this sensitive issue with silence each hoping, down the road, to win the inevitable interpretation argument presently before the Board.

26. Whatever the employer's state of mind the union's silence in this case is readily distinguishable from the employer's silence in *Westinghouse Ltd.*, [1980] OLRB Rep. April 577. In *Westinghouse* the employer was silent on a substantial issue about which the employer had exclusive knowledge. In this instance the union was silent on an issue about which the employer either did or should have had full knowledge. Strategy is a natural and inevitable part of the bargaining process. In light of all the circumstances of this case the Board is not prepared to conclude that the union's conduct was a breach of section 14 of the Act.

27. Turning to the interpretation of the existing collective agreement the Board is unable to conclude that section 6.02, specifically the word "applied", raises an ambiguity over the obligation to supply screws and nails to, thereby, open the door to a consideration of past practice. Section 6.02 sets out the piece work rates applicable to one thousand square feet of drywall applied. "Applied" in this section means "fastened" or "put up". The Board cannot conclude that the word contains any ambiguity with respect to whether or not the cost of screws and nails should be deducted from the rates set out in section 6.02 for every 1000 feet of drywall applied. The section simply does not speak to that issue either directly or impliedly and thus does not raise an ambiguity. The section, in sum, is ambiguously silent on the issue. Moreover, an ambiguity cannot be drawn from the existing collective agreement merely because the collective agreement is silent on the issue of the supply of screws and nails. (See for example *International Nickel Co. of Canada Ltd.* (1974), 6 L.A.C. (2d) 120 (Simmons); *Uddeholm Steels Ltd.* (1971), 22 L.A.C. 419 (Weiler); and *Re Standard Bread* (1963), 13 L.A.C. 327 (Thomas).)

28. In the absence of ambiguity, past practice cannot be relied on to interpret the collective agreement. This principle of contract interpretation was affirmed by the Court of Appeal in *Regina v. Barber et Ex parte Warehousemen and Miscellaneous Drivers Union Local 411* [1968] 2 O.R. 245 at p. 253:

. . . Nor does the subsection [section 34(7) of *The Labour Relations Act*] alter the principles of law as to the construction of written documents,

and the rule which permits extrinsic evidence of intention to be considered only in construing ambiguous writings is essentially one of construction. Where a writing is unambiguous such evidence, although received, cannot be used to construe it. It is true that at least in some respects a collective agreement is different from an ordinary commercial agreement. But the principle that requires the intention of parties to be derived from their plain written words rather than from extrinsic evidence is one applicable to all writings clearly defining rights between parties.

29. Looking strictly to the terms of the 1980 - 1982 collective agreement the Board concludes that it is the employer who bears the responsibility for supplying the screws and nails. The agreement is silent on the issue. An obligation for the employees to supply these critical and costly materials cannot be imposed by silence.

30. The Board's interpretation of the 1980 - 1982 collective agreement is further supported by the negotiating history and the significant change that occurred between the wording of the 1977 - 1980 agreement and the instant agreement. While past practice may not be relied upon in the interpretation of a collective agreement in the absence of ambiguity, prior agreements between the same parties may be. In D. Brown and D. Beatty, *Canadian Labour Arbitration* (1977) Canada Law Book at p. 167 this principle is summarized as follows:

The histories of agreements, that is, preceding collective agreements, . . . are accepted into evidence so as to determine the intention of the parties with regard to any changes made in the relevant section. That is, preceding agreements are utilized to assist in determining the nature of and reason for the change so as to more clearly reveal the parties' intention.

(See also *St. Lawrence Starch Co. Ltd.* (1947), 1 L.A.C. 44 (Wright); *Canada Packers Ltd.* (1962), 12 L.A.C. 299 (Curtis); and *A. V. Roe Canada Ltd.* (1954), 5 L.A.C. 1930 (Laskin).)

31. Whether the provisions of the 1977 - 1980 collective agreement as amended by the second amending agreement relating to houses were uniformly applied by employers or not does not alter the conclusion that pursuant to section 44(5) of the *Labour Relations Act* the two amending agreements duly executed by the parties effectively amended the terms of the 1977 - 1980 collective agreement. Accordingly, from 1978 through 1980 the parties were bound by a collective agreement which specifically provided that the drywall employees both in apartments and houses were obligated to supply their own screws and nails. The parties entered negotiations in 1980 with a view to renewing a collective agreement which explicitly required employees to pay for screws and nails. They then negotiated a collective agreement which on its face removed that obligation. Having specifically negotiated the obligation into its previous collective agreement, the Board must conclude that the removal of the clause from the existing collective agreement reflects an intention to remove the obligation.

32. With respect to the alleged wrongful stoppages of work in June 1980, the Board concludes that even if wrongful conduct occurred, a finding we do not make, we would decline to make a declaration. The complaint in this regard is stale. There is no evidence to suggest precisely who engaged in work stoppages or when. As well, it is common ground that such stoppages are not ongoing.

33. For the reasons set out above the Board makes the following declarations and orders:

- (i) That the employees are not obligated under the terms of the collective agreement in effect between the parties to pay for or supply the screws and nails used in drywall work.
- (ii) That the employer must pay the full piece work rate and cannot deduct from that rate or charge back to the employees an amount for screws and nails.
- (iii) That the employer abide by the terms of the collective agreement.
- (iv) That the employer fully compensate the employees for losses resulting from their violation of the collective agreement.

34. The Board remains seized of this matter in the event that a dispute arises between the parties relating to the interpretation or implementation of this determination.

DECISION OF BOARD MEMBER C.A. BALLENTINE;

1. I concur completely with the decision of the Board in this instant case.

2. This case raises a great concern to me in regard to justice and fairness to the employees. It is difficult for me to understand how the union could agree to a condition as they did by the amendment of June 5, 1978, that their members would be required to pay for the screws and subsequent in the amendment of October 1978, screws and nails, especially without putting a maximum amount on what the employees would be charged for the screws and nails by the companies.

3. It is obvious that the union had to correct this situation in the negotiations for the 1980-82 agreement, otherwise it would have allowed the companies to continue to fix a unilateral charge upon the employees for screws and nails on their piece work rate.

4. Notwithstanding my concern about the charging of employees for screws and nails, I have a concern on the whole practice of piece work. This practice was dealt with by Judge Harry Waisberg in his "Report of the Royal Commission on Certain Sections of the Building Industry, 1974". While dealing with the Drywall Industry, Vol. 1, page 2, His Honour stated: "Piecework is anathema [*curse of God*] to trade unions" (emphasis added). We find, however, that it has been accepted by some locals faced with serious competition. The contractors prefer piece work; they consider that it is necessary where supervision is difficult, and it also allows for cost control.

5. With respect to the alleged wrongful stoppages of work in June 1980, I wish to add that the respondents had open to them a remedy under section 123 if they chose to exercise it. The Board dealt with this issue in *The Metropolitan Toronto Apartment Builders Association* case, [1978] OLRB Rep. Nov. 1022, at p. 1035, paragraph 48:

While there is proof that picketing incidents did occur and that they gave rise to work stoppages, the evidence does not establish to the satisfaction

of the Board that these incidents were authorized by the council or its officers. The evidence of these incidents was somewhat scanty particularly in respect of those incidents that occurred sometime ago. If persons wish remedial relief in respect of this kind of activity, as a practical matter, they must bring an application to the Board when the events are fresh and the Board is better able to assess the evidence. At that point, if illegal activity is established, the Board can issue an order restraining this illegal conduct, and prevent any further damage that might result from it.

It is trite for a respondent to raise alleged wrongful activities after a section 112a has been filed by a union, some considerable time later.

0479-81-R Labourers' International Union of North America, Local 183, Applicant, v. **Kaneff Properties Limited**, Respondent

Bargaining Unit – Certification – Whether Board accepting parties' agreement – Whether description by classification or department appropriate

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *L. Richmond, T. Spada and J. Phillips for the applicant; D. Jane Forbes-Roberts and Gabriella C. Favero for the respondent.*

DECISION OF THE BOARD; July 2, 1981

1. This is an application for certification in which the parties reached agreement with respect to all matters in dispute between them and were prepared to waive a formal hearing before the Board. However, in view of the description of the bargaining unit to which the parties had agreed, the Board held a hearing in the matter and called upon counsel to address the Board with respect to the appropriateness of the agreed upon bargaining unit.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. Counsel advised the Board that the parties had agreed upon the following bargaining unit description:

“All employees of the respondent engaged in cleaning at 2211 Sherobee Road, Mississauga, Ontario, including resident superintendents, save and except resident managers, persons above the rank of resident manager, and office and clerical staff.”

In the recent case of *Modern Building Cleaning a Division of Dustbane Enterprises Limited*, Board File No. 2360-80-R, dated April 14, 1981, unreported, the Board, in accepting a somewhat similar bargaining unit description on the agreement of the parties, expressed

concern over the restrictive nature of the description and expressed doubt that such fragmentation would be accepted in future cases. At paragraph 3 of that decision, the Board stated:

“Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at the Riverside Hospital in Ottawa engaged in cleaning services, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, constitutes a unit of employees of the respondent appropriate for collective bargaining. The Board hereby notes its concern, however, over the restrictive designation of employees ‘engaged in cleaning services’, and expresses its doubt that such fragmentation will be accepted, even on the agreement of the parties, in future cases.”

4. The Board does not generally consider bargaining units consisting of particular classification or departments to be appropriate. The rationale for this approach is set forth as follows in *The Corporation of the City of Barrie*, [1974] OLRB Rep. Nov. 813, at paragraph 8:

“... bargaining units consisting of particular classifications or departments are not generally considered by the Board to be appropriate unless, of course, they constitute the extent of the employer’s work force and even then the description of the bargaining unit would not refer to the classification(s) or department(s) but would be in terms of ‘all employees’; (see *Board of Education for the City of Toronto* [1965] OLRB Rep. 125 (May); *International Harvester Co. of Canada Ltd.* [1962] OLRB Rep. 372 (Dec.); and *Rainee Manufacturing Products Ltd.* [1968] OLRB Rep. 259) (June). Were the Board to act otherwise, the working force of an employer might become fragmented into a number of bargaining units and this in turn could lead to jurisdictional disputes between bargaining units, more numerous negotiations and, therefore, potentially more industrial conflict. In other words, the Board believes that the undue fragmentation of bargaining units is likely to contribute to industrial [in] stability and therefore it has refused to find such isolated groups of employees as constituting units appropriate for collective bargaining; (see *Corp. of The Township of Markham* [1969] OLRB Rep. 592; and *Tamco Limited*, Board File No. 6347-74-R).”

5. In support of his contention that the Board should accept the agreement of the parties in this matter, counsel noted that there is a history of bargaining between the parties to this application. He referred the Board to *Kaneff Properties Limited*, [1978] OLRB Rep. May 431, in which the Board, in a case involving the same parties as the instant case, dealt with the issue of the appropriateness of the bargaining unit confined to cleaning staff at an apartment building located at 2170 Sherobee Road, Mississauga, “just down the street” from the building at which the employees affected by the instant application perform their cleaning duties. In discussing the issue of “whether the bargaining unit should include painters and maintenance personnel, as well as cleaning staff employed in the ... apartment building”, the Board stated:

“6. We turn now to the issue of the scope of the bargaining unit as it relates to the maintenance and painters employed by the respondent. In this regard it must be borne in mind that the Board is called upon to

determine an appropriate unit of employees for collective bargaining, and not to enunciate what might be the ideal bargaining unit in the abstract, (*The Board of Education for the City of Toronto* [1970] OLRB Rep. July 430) and that, when employees in a grouping that is suitable for collective bargaining indicate their willingness to be represented by a given bargaining agent, they should not be effectively denied access to their rights under *The Labour Relations Act* merely because alternative and more comprehensive delineations of employees are possible (*Canada Trustco Mortgage Company* [1977] OLRB Rep. June 330).

7. According to the criteria enunciated in the *Usarco case* [1967] OLRB Rep. Sept. 526, the cleaning staff are an appropriate unit for collective bargaining apart from the maintenance staff. The nature of the work performed by each group is different. Different skills are employed and there is little functional interdependence between cleaners and maintenance staff. There is, moreover, no interchange of employees from one function to the other. A final and telling factor is the geographic separation of the two groupings. The cleaning staff spend all of their time in the building at 2170 Sherobee Road. The maintenance staff, on the other hand, divide their working time in varying degrees among a number of apartment buildings operated by the respondent. A rational collective bargaining structure might, therefore, contemplate their inclusion in either an all-employee unit that would include a municipality-wide area or an all-maintenance employee unit of the same geographic scope. It would not serve the interests of sound collective bargaining to have these full-time employees of the respondent treated as either full-time or part-time employees in the bargaining unit of cleaning staff at 2170 Sherobee Road, depending on their job assignments and physical movement, as suggested by the respondent.

8. The Board therefore finds that all employees of the respondent engaged in cleaning at 2170 Sherobee Road, Mississauga, including resident superintendents, save and except property managers, persons above the rank of property managers, office and clerical staff, constitute a unit of employees appropriate for collective bargaining."

6. Counsel advised the Board that the certificate granted in that decision had given rise to a viable collective bargaining relationship in that the parties had entered into a collective agreement with a recognition clause which paralleled the bargaining unit description contained in the Board's decision. Counsel also indicated that there have been seven other certificates granted to the applicant by the Board for the type of bargaining unit description to which the parties have agreed in the instant case (see, for example, *Armel Management*, Board File No. 1823-80-R, dated February 10, 1981, unreported; *Eto Gourmet Limited*, Board File No. 2158-80-R, dated February 10, 1981, unreported; *Metro International Inc.*, Board File No. 2159-80-R, dated February 10, 1981, unreported; *Allport Investments Limited*, Board File No. 0408-80-R, dated July 17, 1980, unreported; and *Atlantis-Dellpark Towers*, Board File No. 0434-77-R, dated October 17, 1977, unreported). He further advised the Board that each of those seven certificates has resulted in a viable collective bargaining relationship. (The Board has also granted to the applicant, on the agreement of the parties, a number of

certificates confined to "employees engaged in cleaning and maintenance" at specified municipal addresses: see, for example, *Rank City Wall Canada Limited*, Board File No. 2736-80-R, dated April 14, 1981, unreported; *Treal Maintenance*, Board File No. 2161-80-R, dated February 9, 1981, unreported; *York Condominium Corporation #141*, Board File No. 2065-80-R, dated January 19, 1981, unreported; and *York Condominium Number 64*, Board File No. 0005-77-R, dated October, 1977, unreported.)

7. It appears from the submissions of the parties that there are approximately fifty employers involved in the industry to which this case pertains, namely, private sector property management of apartment buildings and condominiums. Many of those employers have several locations covered by collective agreements. Nearly 100 locations are covered by collective agreements in the "property management" field. Approximately one half of the employers belong to an employers' association called The Property Management Services Organization ("P.M.S.O."). The applicant and P.M.S.O. entered into a collective agreement which continued in force from December 1, 1975 to November 39, 1980. Following extensive negotiations, a second collective agreement was entered into in April of 1981. Counsel advised the Board that the rates in the P.M.S.O. agreement "basically become the standard rates in the industry". However, in addition to the P.M.S.O. collective agreement, the applicant has entered into separate collective agreements with a number of employers who do not belong to P.M.S.O. Although the P.M.S.O. collective agreement serves as a model for those other collective agreements, their provisions vary to suit the disparate work practices and organizational structures of the various employers. Of the 800 people employed in the industry who are covered by collective agreements, approximately 400 are under the P.M.S.O. collective agreement.

8. Counsel stated that the applicant is the only trade union in this particular field. He stated that the organization of this industry has been in the process of developing for six years. He argued that the viability of the bargaining units for which certificates have been granted is demonstrated by the success which the applicant has achieved in negotiating collective agreements.

9. Counsel sought to distinguish the *Modern Building Cleaning* case, *supra*, on the ground that it related to cleaning staff at a hospital. It was his contention that concerns about undue fragmentation that are quite justifiable in the context of a large public institution such as a hospital with hundreds or thousands of employees who exercise a vast array of job skills and functions, are not of similar concern in private sector property management of apartment buildings and condominiums where employers, such as the respondent in the present case, generally employ only a few persons in each separate workplace.

10. Counsel for the respondent advised the Board that the only persons employed by the respondent at the building in question in addition to the three cleaners named in the list of employees filed by the respondent, are the resident manager and a person who relieves the resident manager. As in the case of the building at 2170 Sherobee Road (for which a certificate was granted by the Board in May of 1978 in the aforementioned decision), maintenance is performed by a "roving crew" who divide their working time in varying degrees among a number of buildings managed by the respondent in accordance with the varying requirements which exist from time to time. Landscaping work is contracted out and there has never been a lifeguard employed at the premises in question.

11. Having regard to all of the circumstances, the Board is of the view that it should

accept the agreement of the parties with respect to the bargaining unit in the present case. The parties have placed reasonable reliance upon the Board's previous decision (*Kaneff Properties Limited, supra*) in which it found to be appropriate, for a workplace located nearby the workplace affected by this application and substantially similar to it in all material respects, a bargaining unit which is virtually identical to the bargaining unit to which the parties have agreed in the instant case. Moreover, unlike the hospital industry in which potential and actual fragmentation created a distinct need for bargaining unit descriptions which would avoid a multiplicity of bargaining units (see, for example, *Stratford General Hospital*, [1976] OLRB Rep. Sept 459), there is no evidence that any such fragmentation has occurred in the "property management" industry. The information before the Board indicates that fragmentation has not occurred and that the "cleaning" and "cleaning and maintenance" certificates which the Board has granted to the applicant have resulted in viable collective bargaining relationships. Thus, the Board is of the view that it is appropriate for it to continue to accept such agreements with respect to bargaining units in this industry. (However, in the absence of such agreement, if cleaners and maintenance employees employed by an employer divide their time among several buildings in a municipality, the Board may conclude that cleaning staff based at only one or two of those buildings do not constitute an appropriate bargaining unit; see, for example, *Zolty Holdings Limited*, Board File No. 0030-81-R, dated June 24, 1981, as yet unreported, in which the Board found that the appropriate unit should include all employees of the employer engaged in cleaning and maintenance at the employer's buildings in Metropolitan Toronto.)

12. For the foregoing reasons, the Board, having regard to the agreement of the parties, finds that all employees of the respondent engaged in cleaning at 2211 Sherobee Road, Mississauga, Ontario, including resident superintendents, save and except resident managers, persons above the rank of resident manager, and office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

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14. A certificate will issue to the applicant.

0762-81-U; 0763-81-U Lummus Canada Inc., Applicant, v. Karl Airaksinen, et al, Respondent; Acme Building and Construction Limited and Tesc Contracting Limited, Applicants, v. Local 1036, Labourers' International Union of North America, Jimmie Lewis and Wayne Bashaw, et al, Respondents

Construction Industry – Evidence – Section 123 – Whether prima facie proof of agreement established – Board drawing inference of concerted activity

BEFORE: M. G. Mitchnick, Vice-Chairman.

***APPEARANCES:** R. C. Fillion and T. Ervin for the applicant Lummus; G. Grossman for the applicant Acme and Tesc; A. M. Minsky and others for the Respondents.*

DECISION OF THE BOARD; July 8, 1981 (orally)

1. These are consolidated applications under section 123 of *The Labour Relations Act* arising out of a work stoppage in progress at the Eldorado nuclear refinery construction project near Blind River, Ontario. Section 123 provides as follows:

123.-(1) Where on the complaint of an interested person, trade union, council of trade unions or employers' organization the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

(2) Where on the complaint of an interested person, trade union, council of trade unions or employers' organization the Board is satisfied that an employer or employers' organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or that an officer, official or agent of an employer or employers' organization counselled or procured or supported or encouraged an unlawful lock-out or threatened an unlawful lock-out, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out. R.S.O. 1970, c. 232, s. 123(1, 2).

(3) The Board shall file in the office of the Registrar of the Supreme Court a copy of a direction made under this section, exclusive of the reasons therefor, in the prescribed form, whereupon the direction shall be

entered in the same way as a judgment or order of that court and is enforceable as such. R.S.O. 1970, c. 232, s. 123(3); 1975, c. 76, s. 32.

At the conclusion of the hearing of this application on July 8, 1981, the Board issued an oral decision and order, and confirmed that order in writing on July 9th. The reasons for the Board's decision, given orally at the hearing, are now set out hereunder.

2. Having regard to the evidence before it, there is no question in the Board's mind that employees of Tesc, being members of Local 1036 of the Labourers' International Union, because of various grievances, acted in concert, on and after June 30, 1981, to refuse to carry out their work at the Eldorado project, thereby engaging in a strike. They were then joined by employees of Acme, being also members of Labourers' Local 1036. Certain of these employees then set up picket lines at the access road to the project, with the undoubtable purpose, and having the effect, of causing other tradesmen employed on the job not to report for work. It appears that a complete shutdown of the project has taken place, and is continuing to date. The Board must assess the timeliness, and hence the lawfulness of this strike, as well as the conduct of the other tradesmen who refused to cross the picket line.

3. The Board is in full agreement with the submission of counsel for the Labourers' International Union, Local 1036, and its members, that these are proceedings of a most serious nature. Counsel for the Labourers took the position at the hearing that the respondents were therefore entitled to put the applicants to the strict proof of all elements necessary to establish their case. While the Board is wholly in agreement with this general submission of counsel, the Board was also of the view that such proceedings ought not to be side-tracked by what could be described as "non-issues" in the case. Specifically, the Board was required to deal with the issue of proof of the collective agreements. In determining the timeliness of strike or lockout activity under *The Labour Relations Act*, the Board is concerned only with the existence or otherwise of an operative collective agreement. The Board is not otherwise concerned with the provisions of that agreement. In the course of the proceedings, the Board admitted certain documents put forward as provincial collective agreements in effect and binding between the parties hereto. These documents were put forward with less than what one might term "strict proof" in the usual sense. Some were the commonly-used "booklet" copies which bear no original signatures; others were in long form and bore signatures which were not properly proved. Owing to the new regime of provincial bargaining in the construction industry, none of these collective agreements on their face indicated the contractors who were bound by the agreement, nor would the originals be signed by an officer of the particular contractors bringing these applications. In some cases no backup evidence was tendered to establish the bargaining rights which would bring the terms of the provincial agreement automatically into play. The Board indicated that in each case the documents were being accepted only as *prima facie* proof of the existence of the respective collective agreements. That is, the Board accepted the evidence put forward without any prejudice whatsoever to the right of another party to the proceeding to take a position which placed the existence of that collective agreement in issue. Had one of the affected parties done so, the Board noted that an onus would then have rested upon the applicants to strictly prove, and satisfy the Board of, the existence of those collective agreements covering the applicants, as has always been the case.

4. Counsel for the Labourers when asked, however, did not take a position which denied the existence of a collective agreement (nor did any other party to the proceeding). Indeed, it is difficult to see how counsel for the Labourers' could have done so. with respect

to Tesc and Acme, for example, the evidence shows that grievances were filed as recently as July 1, 1981 against both Tesc and Acme alleging, on behalf of the Labourers' International Union and its Locals (including Local 1036) violations of "the collective agreement" on the part of Tesc and Acme. The Board notes that it is an administrative tribunal dealing with an *ongoing* collective bargaining relationship between parties. Quite apart from the admissions which the grievances referred to contain, it is simply inappropriate for a party to file a grievance alleging a violation of the collective agreement on July 1st, and, without further explanation, deny the existence of that collective agreement before this Board on July 8th. There would appear to be no labour relations interest whatever to be served by allowing a party to affirm or deny at whim, as suits the party's purpose, the fundamental existence of a collective agreement, and it is difficult to conceive of any trade union or other party in this province wanting it to be otherwise. Rather, the parties must be prepared to assume the responsibility for the positions which they take from one day to the next.

5. Counsel for the respondent Labourers' union and its members has not, in fact, sought to change his position in these proceedings, nor has he adopted a position which denies the existence of the collective agreement. The *prima facie* evidence tendered by the applicants to show that the employees in question were bound by a collective agreement expiring April 30, 1982, therefore stands uncontradicted, and is accepted by the Board as proof of those facts. The Board accordingly finds that the strike engaged in by employees of Tesc and Acme on and after June 30, 1981 was unlawful.

6. With respect to the Lummus application, the only allegation made by Lummus is that the members of its various trades employed at the Eldorado site engaged in an untimely strike. There was no allegation in that application (as opposed to the applications of Tesc and Acme) that the members of the respondent Labourers' union counselled or procured the unlawful strike. The provincial agreements for each of the trades named in the application of Lummus were tendered in evidence. In addition, the Board received the oral admissions of the representatives of the named parties that a collective agreement was in effect with Lummus during the material time for the employees on Schedule A (being members of the Boilermakers' union, Local 128), Schedule D (being members of the Ironworkers' union, Local 736), and Schedule F (being members of the Teamsters' union, Local 230). With respect to the employees on Schedule B (being members of the Carpenters' union, Local 446), Schedule C (being members of the Pipefitters' union, Local 800), and Schedule E (being members of the Labourers' union, Local 1036), the Board has received as *prima facie* evidence documents purporting to be copies of the relevant provincial collective agreements, together with the sworn testimony of an officer of Lummus that the company is bound by those agreements. Again, that evidence was neither denied nor contradicted. Once again, the Board finds no compelling reason not to accept the uncontradicted evidence of the applicant that it is bound by these agreements, covering the employees on Schedules B, C and E, and the Board so finds. Any "strike" by such employees at this time would therefore be unlawful.

7. The finding of a "strike" within the meaning of the Act requires a finding of "concerted" activity on the part of the employees in question. The Board in the past has adverted to the difficulty in finding proof of employees' motivation on the question of concerted activity, and accordingly has been prepared to draw inferences, in the absence of compelling explanations to the contrary, where incidental refusals to work take place. See, for example, *Nelson Crushed Stone*, [1977] OLRB Rep. Nov. 713, at paragraph 47. Here there has been no evidence tendered to counter the inference that the employees on Schedule A were

acting in concert out of a common respect for the Labourers' picket line, as recognized, for example, in the Supreme Court of Ontario decision of *Smith Brothers Construction Co. v. Jones*, [1954] O.R. 166. The Board further finds on the evidence that the employees named in Schedules A to F were scheduled by the applicant to work, and refused in concert to do so, on and after July 2, 1981.

8. Notwithstanding the above findings, the Board is reluctant to make an order against the employees identified in the Lummus application. On the basis of the submissions of employee representatives, together with the evidence of, for example, the Labour Relations Manager for Lummus, the Board is satisfied that the only reason for the strike engaged in by the employees of Lummus is the Labourers' picket line. Their refusal to cross a picket line and report for work is, however, unlawful, and exposes individual employees to serious consequences. The Board finds it incumbent, therefore, that these employees be told of this in the clearest possible language. The Board accordingly orders all the respondents named in Schedules A to F in the Lummus application to cease and desist engaging in an unlawful strike at the Eldorado nuclear refinery construction project located approximately three miles west of Blind River, and to return to work for their next scheduled shift (in accordance with the Board's order in, for example, *Betchel*, Board File No. 0675-77-U).

9. With respect to the applications of Tesc and Acme, it is clear that at least as of July 2nd, employees of Tesc were engaged in a strike. There is no evidence, however, which of the employees named in the application, including those identified as being present on the picket line, would have been scheduled to work at the time the strike took place. The Board is reluctant to make unfounded assumptions in this regard when naming specific employees in an order of this kind. There are two exceptions to the lack of identification among Tesc employees. These are the stewards, Rejean Fortin and Wayne Bashaw, both of whom the evidence clearly demonstrates were scheduled to work on July 2nd, and failed to do so.

10. It is important that an order from the Board issue with respect to the employees of Tesc. The Board heard evidence of the various problems under discussion with Tesc at the time of the work stoppage, and the Board is not unmindful of the manner in which frustrations can sometimes develop and accumulate in the workplace. The whole scheme of our legislation and collective bargaining system, however, is grounded on the principal that concerted activity, and economic sanctions, such as employed here, can only be resorted to during certain defined periods. Apart from those periods, the problems and disputes must be dealt with through the channels set up under the Act and the collective agreement. The rules have clearly been designed to assist employees in collective bargaining, but they apply to both sides with equal force. Resort to unlawful conduct can only have serious consequences, not only for the employees themselves and their employer, but, as here, for other employees and their employers as well. Here the unlawful and untimely actions of a small group of employees has resulted in the protracted shutdown of an entire construction project, and in a large number of other employees being brought before the Board. In addition to these considerations, if the Board assumes that the respondent Labourers' International Union, Local 1036, has in fact, as it admits, taken the position that its members ought to return to work, and has actively been attempting to accomplish that end, the Board ought to make an order to assist the respondent Local 1036 as well.

11. The Board hereby directs Rejean Fortin, Wayne Bashaw, and any other employees of Tesc to whom notice of this order shall come, to cease and desist engaging in an unlawful

strike at the Eldorado nuclear refinery construction project located approximately three miles west of Blind River, and to report to work for their next scheduled shift.

12. The Board notes that certain of the employees of Tesc and Acme were identified as active members of the picket line, whether by the carrying of picket signs or otherwise. These individuals included Richard Marcoux and Guildo Fortin, employees of Tesc, and Hubert Gareau, an employee of Acme. The Board further notes that the mere presence, whatever may have been its purported purpose, of a baseball bat on the picket line is wholly inappropriate in these circumstances.

13. The Board directs Rick Marcoux, Guildo Fortin and Hubert Gareau, and any person to whom notice of this order shall come, to cease and desist doing anything which will cause, encourage or promote persons employed at the aforesaid Eldorado construction site to engage in an unlawful strike.

14. With respect to the application by Acme, the Board notes that the three employees named in the application were all discharged by Acme as of July 2, 1981. After that date, therefore, it cannot be said that the employees named in the application were engaged in an unlawful strike against Acme. As the only remedy sought by Acme in its application is an order to cease and desist engaging in an unlawful strike, the Board finds no basis on which to make such an order against the three employees named. The application of Acme is accordingly dismissed.

15. The question of the liability of the respondent Local 1036 of the Labourers' International Union through the actions of its officers and stewards, is problematical, particularly in view of the extent of the evidence against them. The Board accordingly declines to deal with that question orally at this time, and reserves on that aspect of the application. Should the applicants still wish that this aspect of their application be ruled upon, one way or the other, they must so advise the Board in writing not later than Monday, July 13th, and a decision will be issued.

0714-81-R Labourers' International Union of North America, Local 183, Applicant, v. **Montevideo Court Apartments Ltd.**, and/or Boa Vista Court Apartments Ltd., and/or Donway East Courts Ltd., and/or Boyaca Court Ltd., Respondent, v. Group of Employees, Objectors

Petition – Employee delivering petition to Board and copy to employer – Whether employer involvement

BEFORE: D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and C. A. Ballentine.

APPEARANCES: *B. Fishbein and T. Spada for the applicant; John D. Gilfillan and Mrs. E. Thwaites for the respondent; Ron Fraser for the group of employees.*

DECISION OF D. E. FRANKS, VICE-CHAIRMAN AND BOARD MEMBER W. H. WIGHTMAN: July 31, 1981

1. This is an application for certification.

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4. The bargaining unit in the present case consists of two employees. Prior to the terminal date in this matter, there was filed with the Board, a letter by one of the employees indicating that he had withdrawn his support from the applicant trade union. At the hearing in this matter, the Board heard the evidence of Mr. Ron Fraser concerning the preparation and origination of the letter sent to the Board. He testified that after signing the union membership card, he discussed the matter with his wife. The discussions with his wife were quite extensive and as a consequence of these he decided to file the letter with the Board. His evidence is that he discussed the contents of the letter with his mother-in-law who in turn, on his instructions, drew up the letter and typed it for him. This was apparently done at her place of employment and after it was prepared Mr. Fraser's wife went to her mother's work place and obtained a copy of the letter which she then took back to Mr. Fraser's place of employment. Mr. Fraser then signed the letter and his wife took it to the offices of the Board. Mr. Fraser also signed another copy and he immediately took that to the office of his employer in the complex of buildings where he works and gave the letters to Mrs. Thwaites who is a property manager for the respondent employer. He recalled having some discussion with Mrs. Thwaites at that time. However, he could not recall what the substance of that discussion was.

5. Mr. Fraser's evidence was confirmed by Mrs. Fraser concerning her part in obtaining the letter from her mother and delivering it to the Labour Relations Board. In this matter there is no evidence that the employer, either directly or indirectly participated in the origination or preparation of the letter filed by the employee in this matter. Indeed, we are prepared to accept Mr. Fraser's evidence that after the discussions with his wife, he voluntarily changed his mind concerning membership in the union.

6. Counsel for the applicant trade union argued, however, that Mr. Fraser's conduct in this matter could not be construed as voluntary, since given the relationship between an employee and his employer, the fact that Mr. Fraser gave the letter to his employer thereby

letting him know that he had rejected the trade union is in itself not voluntary conduct. We cannot accept the implications suggested by the applicant trade union. Clearly, this is not a case where an employee signs a petition with a reasonable apprehension that his privacy would be invaded by the employer seeing the petition. Indeed, we are prepared to accept on the basis of Mr. Fraser's evidence, that he really had changed his mind before he let his employer, know that he had changed his mind about the trade union.

7. Counsel for the applicant also suggested that on the evidence there were serious gaps concerning the actual preparation of the petition in this case. Thus, for instance, the Board did not hear the evidence of Mr. Fraser's mother-in-law who actually typed the letter. While the Board has in numerous cases rejected petitions where there are gaps in the evidence concerning the people dealing with a petition, we are satisfied that the lack of evidence by Mr. Fraser's mother-in-law is such that it would cast a doubt on the origination and preparation of the petition as a voluntary statement by the employee. Indeed, it is clear from Mr. Fraser's evidence that he had instructed his mother-in-law to type the letter and his mother-in-law has no connection with the respondent employer in the present case. She was in fact merely acting as a secretary or stenographer on his behalf.

8. For the foregoing reasons, therefore, we are prepared to accept the petition in this case as voluntarily signifying a withdrawal of support from the applicant trade union.

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13. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I disagree with the majority decision, on the grounds that the petition of Mr. Fraser was not voluntary.

2. I believe Mrs. Thwaites, the property manager, was behind the petition letter. The evidence of both Mr. Fraser and Mrs Fraser reveals that Mr. Fraser's mother-in-law had discussions with Mrs. Thwaites; it was thereafter that Mr. Fraser was pressured by both his wife and mother-in-law to change his mind and go against the union.

3. The significant point in this case is that Mr. Fraser thought it necessary to deliver a copy of the petition letter to Mrs. Thwaites. Mr. Fraser in evidence stated she read the letter and thanked him for it.

4. Mr. Fraser gave evidence that he changed his mind because *he was afraid he would lose his job*. This surely is grounds enough for the Board to reject the petition. The Board always has had concern to the sudden change of heart; that is why the Board's practice has been to conduct its own inquiry into the circumstances that give rise to a petition. The circumstances of this case lead me to believe the petition should fail.

5. It was obvious that Mr. Fraser was suffering from a fear complex. This is sad; no employee should have fear to the extent that he is deprived of his rights to join a union of his choice, which is provided by the Act.

6. For the majority to order a vote in this case is ludicrous. By all intent and purpose the union is defeated. There are only two people in the bargaining unit. It is not hard to assume as long as Mr. Fraser is an employee of the respondent company and continues in his state of fear, both he and his fellow worker will be deprived of having the right of free collective bargaining through a bargaining agency.

7. My decision is that the applicant union should be certified as the bargaining agent for the two employees of the respondent.

1592-80-M Murray G. Strong, complainant, v. Carl Finlay, Secretary-Treasurer, Local #222, United Automobile, Aerospace and Agricultural Implement Workers of America, Respondents

Financial Statements – Whether disclosure of lost-time wages and salaries for individuals necessary – Financial statement conforming to Canadian Institute of Chartered Accountants recommendations on presentation and disclosure – Whether adequate

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and L. Hemsworth.

APPEARANCES: *Murray G. Strong for the complainant; Carl Finlay and James Wilbur for the respondents.*

DECISION OF THE BOARD; July 15, 1981

1. The name: Carl Finlay Sec. Treasurer. UAW Local 222” appearing in the style of cause of this complaint as the name of the respondents is amended to read: “Carl Finlay, Secretary-Treasurer, Local #222, United Automobile, Aerospace and Agricultural Implement Workers of America”.

2. The complainant has complained to the Board that the respondents have failed upon his request to furnish him with a copy of the audited financial statement of its affairs to the end of its last fiscal year, certified to be a true copy by its treasurer or other official responsible for the handling and administration of its funds, contrary to section 76 of *The Labour Relations Act*.

3. The complaint was accompanied by the following letter:

Dear Sir,

I am presently employed by General Motors in the Oshawa maintenance dept.

I am requesting a financial audit of local 222 UAW as explained in the Labour Relations Act, (76-2).

On Monday Aug. 25, 1980 I spoke to financial secretary, Carl Finlay concerning the amounts of lost time and wages being paid by the hall. At this meeting I requested an adequate financial statement with *all* details. The one given the membership only generalizes certain accounts (copy enclosed). I explained I had read the booklet on Labour Relations Act and was officially requesting an adequate audit. Mr. Finley stated "you guys are always nitpicking, go fuck yourself". I have sent a registered letter (copy enclosed) to Mr. Finley in case there might have been a misunderstanding.

At the shop committee meeting on Sept. 2, 1980, a letter was received from Mr. Finley and read to the members informing those present that because of actions by Murray Strong everyone would have to sign in and out if they were to be paid for these meetings. This letter is included in the minutes and if your office could obtain a copy it would show Mr. Finley has already attempted to intimidate me by this action. (71-2-A)

I have heard rumors, and they are only rumors, that Murray Strong will get a bullet in the head or cement shoes.

I guess I should say I have some fear of future action which could take place but I am doing this for the benefit of all the members of Local 222 UAW.

I have received no reply to my letter, therefore after waiting 10 days for an answer, I would like to ask if someone from your office could secure an adequate financial statement.

I am not stating my local is doing anything wrong but why would a financial secretary tell any member of the UAW union "to go fuck yourself" if there was nothing to hide.

I thank you for taking the time to read this.

Yours sincerely

"Murray Strong"

4. In their reply to the Board dated November 14, 1980, the respondents stated in paragraph 4 as follows:

(1) The original request, made verbally approximately August 25, 1980, pertained to lost time records and other payroll related matters, and not the Local's financial statements as contemplated under section 76. (2) The registered letter (copy attached), not dated or signed, fails to demand either specific time periods or statements. (3) The Oshaworker regularly publishes the Local's financial statement for membership review.

5. It was agreed that the complainant is a member of the respondent trade union and

that the complaint was properly before the Board. The respondents initially adopted the position that while they recognized the jurisdiction of the Board, the complainant ought to be required to exhaust the respondent trade union's constitution and by-laws before the Board entertained the complaint. The respondents relied on the decision of the Board in *Amalgamated Transit Union, Local 113*, [1979] OLRB Rep. Oct. 917. The Board reserved on this position by the respondents and invited the complainant to provide the details of this complaint against the respondents.

6. The complainant informed the Board that the information he sought was not adequately provided in the respondent trade union's financial statement and consisted of the following items: (i) lost time wages, (ii) expenses and travel, (iii) salaries and (iv) entertainment and gifts. It was also the complainant's position that the financial statement filed with the Board was not an audited financial statement as required under the Act. It therefore appeared to the Board that the complainant was complaining about a failure by the respondent trade union to furnish him upon his request, without charge, with a copy of its audited financial statement of its affairs to the end of its last fiscal year certified by its treasurer or other officer responsible for the handling and administration of its funds to be a true copy as provided for in section 76(1). It also appeared to the Board that the complainant was complaining that this financial statement was inadequate within the meaning of section 76(2).

7. The complainant informed the Board that he had requested this information from the respondent Carl Finlay at a meeting of the respondent trade union last Fall. It was the position of the complainant that Mr. Finlay promised him this information and then denied him this information. The complainant also informed the Board that he asked Mr. Finlay during March of this year for the "lost time" of John Sinclair, Phil Bennett and Nip Tucker. The complainant further informed the Board that Mr. Finlay subsequently informed him that the executive board in Toronto had overruled his request. However, the complainant conceded that he had neither requested information about how the members' money was spent at a membership meeting nor made a formal complaint to the respondent trade union's recording secretary.

8. It was the position of Mr. Finlay that a monthly report is read at the respondent trade union's monthly meetings and that the complainant never requested information at these meetings and, in particular, had not asked for details of the "lost time".

9. Counsel for the respondents informed the Board that, while the respondent trade union was unable to provide figures for the amounts paid to individual members for "lost time", it would disclose the number of hours paid and the rate at which payment was made at the monthly membership meetings and that this was provided for under article 13 of its by-laws. Counsel also informed the Board that the respondent trade union could provide details on expenses with respect to publicity and entertainment at its monthly membership meetings and that it was on these occasions that such requests for information could be considered.

10. During an adjournment of the hearing, the parties narrowed the issues in this complaint. The respondents offered to provide the complainant during office hours on the day following the hearing with the information he required with respect to the expenses for publicity, entertainment and gifts and the cost of the audit. The complainant informed the Board that he understood the respondent's offer and that he accepted it. At that point the complainant continued to request information with respect to lost time wages and salaries.

11. At this point the Board heard testimony from Dale Tinkham of the firm which acts as the accountants for the respondent trade union. Mr. Tinkham is a member of a firm and is licensed by and a member of the Institute of Chartered Accountants in Ontario. He gave evidence that the financial statement for the respondent trade union represented and contained reasonable information with respect to its financial affairs. The witness also informed the Board that in his opinion the financial statement for the respondent trade union was in conformity with the recommendations of the Canadian Institute of Chartered Accountants with respect to presentation and disclosure. With respect to salaries, Mr. Tinkham informed the Board that there was no mandatory requirements in the recommendations of the Canadian Institute of Chartered Accountants for the disclosure of individual salaries whether of officers of the respondent trade union or its office staff. When questioned about the disclosure of "lost time" in a financial report, the witness qualified his answer by pointing out that "lost time" (that is to say, the compensation of members of a trade union for wages lost while engaged on the business of that trade union) is peculiar to trade unions. He stated, however, that it was not a practice to either disclose or to recommend its disclosure. Mr. Tinkham concluded his evidence by stating that in his professional opinion the information contained in the respondent trade union's financial statement was adequate. Ted Murphy, the president of the respondent trade union, informed the Board that details of the "lost time" for a past month would be given at the monthly membership meetings if a request for such information was made at that time.

12. Prior to entertaining argument on the evidence before the Board, the respondents supplied to the complainant the names of four full-time officers, the secretarial staff and the janitors who were receiving wages and salaries from the respondent trade union. The complainant argued that he did not have a properly audited financial statement and stated that he could not understand why the respondents would not provide him with the hours of "lost time". At this point, the complainant reduced his request to elected representatives and decided to abandon his request in so far as it related to standing committees and conventions. The respondents argued that the financial statement of the respondent trade union is audited by a firm of chartered accountants and by the trustees of the respondent trade union and that the financial statement is an audited financial statement within the meaning of section 76(1). The respondents also argued that the financial statement was adequate within the meaning of section 76(2) and relied on the unquestioned testimony of Mr. Tinkham.

13. The financial statement which has been given to the complainant and which has been produced before the Board has not been audited by the respondent trade union's chartered accountants. However, it is the uncontradicted evidence before the Board that the trustees of the respondent trade union have audited this financial statement and Carl Finlay, the secretary-treasurer of the respondent trade union, and the person responsible for the handling and administration of its funds, has certified before the Board that the financial statement provided to the complainant and produced before the Board is a true copy of the respondent trade union's financial statement. The Board finds that the respondents have satisfied the requirements of section 76(1) of the Act.

14. With respect to the adequacy of the financial statement, the evidence of Mr. Tinkham is that from his professional point of view the financial statement is adequate. The Board notes that a gross figure is set forth in the expenses of the respondent trade union under the heading of "Lost time — wages". A financial statement is a statement of net assets and a summary of income and expenses of a particular operating entity and does not set forth the

minutiae of detail of the source and origin of every cent which is received and disbursed. This minutiae of details is to be found in the vouchers and bank statements of an operating entity. In order to obtain details of "lost time", it is open to the complainant to request this at the respondent trade union's monthly meetings pursuant to its by-laws. On the basis of the representations before it, the Board is satisfied that the complainant has a method of seeking detailed information of "lost time" at the monthly membership meetings and that such a method under the respondent trade union's by-laws is neither impractical nor illusory and that it would be neither inconvenient nor unreasonable to require the complainant to make his inquiries to the respondent trade union in accordance with its by-laws (see *Amalgamated Transit Union, Local 113, supra*) before requesting the Board, in the exercise of its discretion, to make the inquiry into the complaint under section 76(2).

15. This complaint is dismissed.

1125-80-R; 1275-80-U; 1276-80-U; 2055-80-U International Ladies' Garment Workers' Union, Complainant/Applicant, v. **Newport Sportswear Limited**, Respondent

Certification – Consent to Prosecute – Discharge for Union Activity – Petition – Whether petition voluntary when employer discharged union supporters – Whether damages to employees in addition to compensation appropriate – Other remedial orders considered – Whether prosecution appropriate in light of remedial relief granted

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Beth Symes for the complainant/applicant and W. J. McNaughton for the respondent.*

DECISION OF THE BOARD; July 7, 1981

1. By a decision dated January 6, 1981 the Board certified the applicant union as the exclusive bargaining agent for the employees in the respondent's office. In addition to the union's application for certification and its request that the Board, if necessary, exercise its discretion under section 7a of the Act (file no. 1125-80-R), the union filed two complaints under section 79 of the Act (file nos. 1275-80-U and 2055-80-U) and an application for consent to prosecute the respondent under section 90 of the Act (file no. 1276-80-U). Pursuant to an order of the Board these matters were consolidated. As set out in its decision dated January 6, 1981, the Board certified the applicant on the basis of its membership strength alone. It was not therefore necessary to consider the exercise of its discretion under section 7a of the Act. Following certification, the Board heard evidence and argument relating to the two section 79 complaints and the application for consent to prosecute.

2. In the first section 79 complaint (file no. 1275-80-U) the union alleges that Ms. Jane Walker, an office employee, was discharged by the respondent employer contrary to the Act.

In its second complaint (file no. 2055-80-U) the union contends that Ms. Hilda Rampersaud was also dealt with by the respondent contrary to the Act by being presented with the choice of either transferring from her position in the office bargaining unit back to the factory, where she had previously worked, or leaving the employ of the respondent.

3. At the time of the application for certification there were seven employees in the office bargaining unit. It is common knowledge that at the outset the union had 100% of the employees as members. Support fell, however, when five of the employees who continued to be members signed a petition in opposition to the application for certification. Subsequently two of those five employees signed counter petitions or re-affirmations of union support. Following evidence and submissions from the parties the Board found, on October 24, 1980, that the re-affirmations were voluntary expressions of the views of their signatories. The Board then determined that the union enjoyed sufficient support among the employees in the bargaining unit to be certified without either the taking of a representation vote or the exercise of its discretion under section 7a of the Act. The union alleges, however, that it lost a significant portion of the unanimous support for certification among the employees in the bargaining unit through the employer's intimidating conduct which, the union argues, included the sudden relocation of two bargaining unit employees and initially culminated with the discharge of Jane Walker. The union contends that some months later the employer again violated the Act through what the union characterizes as Hilda Rampersaud's forced resignation or effective discharge. It is a remedy for these alleged breaches of the Act that the union brings this matter before the Board.

4. As set out in the Board's decision dated March 24, 1981, Mr. E. Waxman, the president of the respondent, fell ill in November of 1980. His illness occurred after these proceedings had started but before he had had an opportunity to testify to the matters raised in the section 79 complaints. Because of the serious nature of his illness and the prediction that he might not be able to testify for over a year, the Board proceeded in his absence. Notwithstanding these circumstances the Board has been able to determine the issues, however, because evidence was given by two other members of management: Mr. Jerry Starr, the vice-president of the company and general production manager and Ms. Mary Goldberg, the controller and office manager. Either or both of these persons, or at least one of the objecting employees, was present at all material events. The Board has declined to place any weight on a conversation which took place solely between Waxman and Walker the day before she was fired because the Board was at the disadvantage of having heard only the grievor's version of the conversation.

5. It is apparent on the evidence that the respondent's management was upset by the office employees' application for certification. The notice of the application for certification arrived at the respondent's offices on Monday, September 8, 1980. Soon thereafter Starr and Goldberg met with Waxman in his office. As the plant employees had already been unionized, management's first reaction to the notice was that there had been some mistake. Starr testified that when he realized that the application related to the office employees he was "slightly dismayed". He said he thought the office employees were happy and felt that the application meant that they weren't. He acknowledged that he viewed the application as a personal affront and was generally displeased. On cross-examination Starr stated that Waxman had mentioned to him a few times that he was upset about the application. Goldberg testified that "when [they] calmed down a bit," after receiving the notice of the application, they called Janice Ford, one of the office employees in the bargaining unit, into Waxman's office. Ford

and another employee in the unit, John Jamison, appeared throughout these proceedings as objecting employees. It is common ground that when Ford was called into the office Waxman said, "What is this about the union". He then asked her if she had joined the union. Before she responded to the question, however, Starr advised her that she did not have to answer.

6. Pursuant to discussions with Starr and Waxman, Goldberg held a meeting of the office employees the following day to emphasize to them the confidentiality of payroll information. Goldberg testified that she did not want the names and addresses of factory employees who did not want to join the union to be released to the union through the office employees, now seeking representation by the same union.

7. Thursday, September 11th was a Jewish holiday and Starr, Waxman and Goldberg were out of the office. When Waxman returned on Friday, September 12th he convened a meeting of the office employees. Among other matters, he expressed dismay over what he presumed had been union meetings held among the employees while he and his colleagues were out of the office the previous day. There is little dispute on the evidence that prior to the union's application for certification the respondent's office was a congenial place to work. It is undisputed that regularly, though not continuously, the office employees discussed non-working matters during the course of the day. They composed, for example, a comical newsletter that was both typed and distributed on company time. On the Jewish holiday in question, the office was not particularly busy and it was acknowledged by employees testifying on behalf of the union that from time to time conversations relating to non-working matters occurred between a few of the employees. They each stated, though, that the amount of personal discussion that day was about the same as any other day. What was unusual from the employees' point of view was the fact that Mr. Jim Lambrakis, a member of management in a related company located in the same building, walked through the office six or seven times when he might normally do so once or twice. Starr testified that because he, Waxman and Goldberg were away Lambrakis had been placed in charge. Walker, however, testified that whenever Starr, Waxman and Goldberg had previously been away for Jewish holidays, Janice Ford had been put in charge. On one of Lambrakis's trips through the office he saw Walker and Sandra Dent, another employee in the unit, talking. When he asked if they were having a union meeting, the replied they were not and he left.

8. Early Friday morning Lambrakis told Starr that he had to break up a couple of meetings in the general office on the Jewish holiday. Starr stated that while he was not alarmed by the fact that the employees had had meetings, he and Waxman felt that just in case union activity was being pursued on company time, the employees should be told to confine union activity to non-company time.

9. Later that morning, therefore, Waxman held a meeting of the office employees. One aspect of the first section 79 complaint arises directly out of this meeting. Walker testified that when she arrived at work that day Janice Ford told her that Waxman was furious about meetings that had taken place in the office the day before. There is little conflict in the testimony about what Waxman said at this meeting. The Board concludes on the evidence that he stated that he had always been a fair employer, that he was not against unions but that things would be different. He stated that the company was a place of work and that no union meetings were to take place on the premises. He then pointed to Walker and, according to Walker, said "You, you are going downstairs." After that he turned to John Jamison one of the objectors. According to Jamison, Waxman said that he would be going to the shipping

department because they could not use him in the office at that time. Jamison was initially upset at being sent to shipping. He testified that his concerns were alleviated though when he subsequently spoke to Waxman about the situation. Waxman explained to him that his move was temporary, that he would be working in shipping for the month of September and that when things got easier in shipping he would go back to the office. He in fact returned to the office on October 8th, 1980, presumably, therefore, because the pace in the shipping department had by that time eased off. Further reference will be made to Jamison's return to the office in dealing with the second section 79 complaint.

10. The union contends that moving the work stations of both Jamison and Walker were designed to break the back of the union's drive by intimidating the employees and physically breaking up or separating the group of office employees which had, until this time, uniformly supported the union.

11. Counsel for the company argued, on the other hand, that relocating Jamison and Walker was a business decision motivated neither in whole nor in part by anti-union *animus*. Counsel asserted that Jamison was moved from the office to shipping because at that time, in September, the company was at the height of its fall shipping season and the office was not particularly busy. An additional factor requiring Jamison's temporary move to shipping, according to counsel for the company, was the fact that Hilda Rampersaud, the grievor in the second section 79 complaint, was frequently absent from work during September, a time when the company required the shipping department to be operating at full capacity. With respect to Ms. Walker, Starr testified that the purpose of Walker's relocation to the second floor was to increase job efficiency by placing her payroll office near the factory employees. He stated that the company's plan pre-dated the union's application and had been, for some time, to move payroll down to the second floor as soon as the air conditioning was in operation on that floor. This occurred sometime in the first half of September though no one could say precisely when.

12. Walker handled the payroll for the factory employees. To fulfill her function she required daily access to the personnel files. She was routinely required, for example, to effect changes in addresses, names, wage rates and deal with OHIP matters. The evidence demonstrates that if factory employees had problems with their pay cheques they would speak with Walker directly. Similarly, they would speak with Walker to make required changes in the information recorded in their personnel files. Walker also spent time doing job costing work which did not involve access to the personnel files.

13. The Board accepts on the evidence that the company's plans to move the factory payroll office down to the second floor were in place prior to the application for certification. Within two weeks after Walker was hired on May 1, 1980 Goldberg informed her that she would be moving to the second floor because it would be more convenient for her to be closer to the factory workers. Sometimes later Walker asked Goldberg when the move would in fact take place and was told, "When Starr gets himself organized." Similarly, Maria DaSilva, another employee in the bargaining unit, testified that she had heard people talk about the payroll person moving downstairs to the second floor even before Walker came, though nothing had ever been done about it.

14. Pursuant to Waxman's instructions and immediately following the Friday morning meeting Walker, with Starr's help, moved to the second floor. In the course of moving Starr gave her specific instructions as to the way she was to carry out her job from that point

onwards. The Board accepts on the evidence Walker's uncontradicted testimony that Starr, among other directions, advised her that she was to no longer respond to landlord credit inquiries and that any further such calls would go to Janice Ford. A satisfactory business reason for this change in Walker's duties is not apparent on the evidence. It is common ground that Starr further instructed Walker that the personnel files were to remain on the third floor. He directed her to save up all matters relating to the files and go to the third floor to obtain access to them only once a day. While it is clear that from the time of her move she was only allowed to go to the third floor to use the personnel files once a day, there is a conflict in the testimony as to whether the one time was to be at the end of the day or, instead, whenever she deemed it most convenient. Starr testified that he instructed her to come up at the end of her daily routine and that he told Waxman that it was to be once a day at the end of the day. Walker testified that Starr's instructions did not specify the time of the day. While it is not necessary to resolve this issue of incredibility, we note that Starr's account of this instructions tends to raise more questions about the employer's motivation than Walker's. The adequacy of Walker's job performance was undisputed. If the aim of moving her to the second floor was to increase efficiency the objective would be more readily achieved, in the Board's opinion, given the varied nature of Walker's functions, if Walker could herself determine, during the course of the day, the most expeditious time to exercise her single access to the personnel files.

15. No matter what the time of day, if any, was in fact specified, it is readily apparent that Walker's access to the personnel files was being curtailed. Starr acknowledged that Walker's duties required her to have daily access to the personnel files. According to Walker, Starr explained that her access to the files was being limited because they contained confidential information. This is consistent with the meeting that Goldberg held with the employees the day following the company's receipt of the notice of the application for certification during which she stressed the confidentiality of the office jobs. According to Walker she noted in particular the confidentiality of Walker's job (she had information about the factory employees) and Jamison's job (he dealt with the payroll). It is undisputed that prior to this the employees had not been instructed that their jobs were confidential. Walker testified that Starr explained that the procedure being established limiting her access to the files would be for her protection so that she wouldn't be compromised if information got out. When asked about this comment at the hearing, Starr stated that Walker may have taken his remark out of context, indicating that what he was trying to say was that she should keep union business completely separate from company business. Starr further instructed Walker that she should save all matters relating to such things as mistakes on time sheets to the end of the day and, at that point, take them up with the supervisor rather than with the factory employees themselves as she had often done in the past. The Board has some difficulty understanding this instruction in view of Starr's other testimony that the aim of Walker's move downstairs was to increase Walker's efficiency by having her closer to the factory employees. According to Walker, Starr gave her the even more general instruction that she shouldn't talk to factory employees anymore unless it was absolutely necessary for her job.

16. Starr acknowledged that he and Walker discussed the union during this conversation and that he expressed to Walker his opinion that it was unusual for a union to organize office employees in addition to the plant employees. He further acknowledged that he told Walker that they would rather give the employees directly any additional monies that it would cost the company to have the union than to have the union itself. He emphasized though that he also told Walker that the choice was theirs to make.

17. It is clear on the evidence that Walker was the leader among the employees in

bringing the union into the company. It was Walker's husband, for example, who suggested which union the employees should approach; it was he who contacted the union and set up the initial meeting. Maria DaSilva testified that Walker was the ring leader and the strongest union supporter among them. When Starr was asked on cross-examination at what point in time he had concluded that Walker was the instigator of the union activity, he responded, "It grew on me; it became obvious that Jane was instrumental in getting this thing organized."

18. In the Board's view significant doubt is cast on the alleged business motives for relocating Walker and Jamison by the fact that these moves were not discussed with either Starr or Goldberg prior to the meeting on Friday when Waxman announced them to the employees. At one point in his testimony Starr stated that he and Waxman discussed most matters affecting the company. Apart from Waxman telling the employees that there were to be no more union meetings on company time, however, Starr acknowledged that he was not, on the morning of September 12th, aware of any other changes in the office that would be taking place or would be announced at Friday's meeting. Similarly, Goldberg, the office manager, testified that she did not learn about Walker's move until she returned to work the following Monday. She agreed that the matter had not been discussed with her previously. While it had always been understood that at some point the payroll clerk would move downstairs, Goldberg testified that she had not been informed prior to the move that Walker's move was imminent. Similarly, with Jamison's move, both Starr and Goldberg indicated that Waxman had not discussed it with them before the meeting with the employees on Friday. Goldberg testified that she was somewhat upset by the move because she anticipated that it would cause a disruption in the office. She testified that when she learned about it she told Waxman that it would be okay if it was for only a few weeks. She emphasized that she wanted him back the minute he was finished with his work in the shipping department. Goldberg's reaction to Jamison's move raises doubts about the validity of the initial reason Waxman gave for moving Jamison. Both Jamison, who appeared on behalf of the objectors, and Walker testified that Waxman stated at the meeting that Jamison was going to shipping because they couldn't use him in the office. It is obvious from Goldberg's testimony that there was a need for Jamison in the office.

19. Moving employees from one floor to another and from one department to another is not an every day event at the respondent's company. If the moves had been motivated purely by business concerns the Board would have expected that these moves would have been discussed at least with the office manager prior to being instituted. Furthermore, the Board concludes on the evidence that given the restrictions that were placed on Walker's access to the factory employees, the personnel files and her movement from the second to the third floor, the efficiency of her job performance did not in fact increase with her move to the second floor. It is of further interest that since Walker's dismissal in September, her job has been performed by Janice Ford on the third floor. Viewing these considerations together with Starr's testimony as to Waxman's reaction to the union's application and management's sudden concern about the confidentiality of Walker's and Jamison's jobs as expressed in Goldberg's meeting, the Board concludes that Waxman's relocation of two out of seven of the office employees was designed to disrupt the union campaign, intimate employees and separate its strongest member from the other employees. While management may have intended to at some point move the payroll office back down to the second floor, the Board is satisfied that the sudden implementation of that idea on Friday, September 12th was motivated solely by anti-union animus contrary to sections 56, 58 and 61 of the Act.

20. Walker's relocation to the second floor took place on Friday, September 12th. It

was on the following Monday, September 15th, that a petition in opposition to the union was circulated. It is clear on the evidence that with the circulation of the petition the previously unified group of union supporters disintegrated. The friendly atmosphere in the office disappeared and relationships between various employees became strained.

21. The following day, Tuesday, September 16, Walker was fired. The events which immediately preceded her discharge are outlined below in some detail as they are relied on by counsel for the respondent as the explanation for Walker's discharge. A dispute arose among the employees regarding who would manage the reception desk during the lunch hour on Tuesday, September 16th. Goldberg testified that she was upset about the tension in the office and decided to call a meeting of the employees. The meeting was attended by four employees (Sandra Dent, Janice Ford, Donna Alsop, Jane Walker) and Mary Goldberg. There is little conflict in the evidence as to what transpired prior to Waxman's entrance. Walker gave the following account which the Board accepts. Goldberg began the meeting by stating that she did not like the atmosphere in the office and the open warfare that had developed between management and the employees as well as between the employees themselves. Goldberg said that she was upset that the employees had gone behind their backs instead of coming to management. Walker interjected that according to the law management does not have the right to be involved, a comment which apparently upset Goldberg. Goldberg then stated that Jamison had felt harrassed by the union, noting that a person from the union had followed him home. Walker, in contradiction, replied that hte individual from the union had been invited to Jamison's house. The subject of the meeting then turned back to the unpleasant atmosphere in the office. As an example Goldberg brought up the problem that had triggered their meeting. She said that Sandra Dent had been "bitchy" with Janice Ford because Janice had not wanted the union and added that Dent had called Ford a traitor. At this point in the meeting Sandra Dent broke down in tears saying she couldn't take anymore. She declared she was quitting and walked out crying. Walker testified that in support of Dent she said, "There's another example of harrassment". It is clear on the evidence that Goldberg was somewhat upset that Walker would label the incident one of harrassment and tried to explain to Walker the nature of the problem that had arisen over covering the reception desk for the lunch hour.

22. At this point Waxman, who apparently had been listening at the door for a while, walked in asking Goldberg why she was explaining the receptionist's job to Walker when it had nothing to do with her. Goldberg testified that she replied that she thought an explanation was in order. According to Goldberg, Waxman then told Walker to go downstairs and not to come up for any reason not even to use the toilet. It is clear on the evidence of both Walker and Goldberg that when Walker replied that the union would hear about this, Waxman became sarcastic and mocking. He said, "Ah, the union, I hope the union doesn't take me to court; I hope they don't send me to prison or have me hanged". Walker replied, "I do". She explained that her comment was intended to indicate that she hoped the union would take action, knowing full well that he would not be sent to prison or hanged. Waxman replied, "Ah, you want me to be sent to jail. Did everyone hear that?". It is common to the testimony of both Goldberg and Walker that Waxman then said to Walker, "You've been nothing but trouble since you came here". Walker replied that they had merely been trying to exercise their rights. At that point Waxman ordered Walker to go back to work. As she was leaving he added that she was not to show her face on the third floor without the explicit knowledge and consent of management. Goldberg testified that this was the first time she had been made aware of these instructions concerning the limitation on Walker's access to the third floor. She commented in her evidence that while she thought there would be problems with these instructions she presumed they would work it out.

23. During this exchange both Waxman and Walker were angry and speaking in raised voices. Walker testified that as she was waiting for the elevator she heard Waxman screaming in Goldberg's office, "Do you have any problems, Donna?" "Do you have any problems, Janice?" to which she heard no response. Goldberg confirmed that he was yelling and could be heard all over the office. Goldberg commented that Donna was terrified but that Janice, who knew Waxman better, was not. There is some contradiction in the evidence as to what was said next. According to Goldberg, Waxman said, referring to Walker, "That little piss pot thinks she runs the office but she can't tell me what to do.". Walker, on the other hand, testified that Waxman, in addition, threatened to break her legs. According to Walker, Waxman said, "That piss pot thinks she runs the office. Well she doesn't, I do. If I could get that piss pot on the floor I'd break both her legs". Walker told the Board that upon hearing that threat she went back to the office to let Waxman know she had heard what he said and to tell him that the union would also hear about it. According to Walker, Waxman then went wild. She said that she had never seen anyone so angry. Both Goldberg and Walker testified that Waxman then walked towards Walker repeatedly pointing his finger at her and yelling that she was fired. Walker testified that he said, "You insubordinate piss pot. You're fired and don't show your face in here again".

24. The union argues that Waxman discharged Walker because of her active role in supporting and promoting the union. Counsel for the company, on the other hand, contends that Waxman discharged Walker because she was insubordinate. Company counsel argued that Walker began the union campaign expecting an adverse reaction from management and by her own aggression guaranteed that something adverse happened. Counsel was critical of Walker for arguing and pursuing matters in discussion with management. If Walker had not done this, according to counsel for the company, confrontation would have been avoided and Walker would not have been discharged. During the meeting in Goldberg's office on September 16th, just prior to Walker's discharge, for example, counsel for the company suggests that there were numerous points at which Walker's responses unnecessarily exacerbated the situation. He notes that when Goldberg stated that she was disappointed that the employees had gone behind management's back instead of coming to them with their complaints, it was unnecessarily aggressive to "set the record straight" and inform Goldberg that it was none of management's business. When Sandra Dent left Goldberg's office crying, counsel argues, Walker's comment that that was another example of harassment served only to heighten the tension between herself and management. Concerning her argument with Waxman, counsel asserts that everything would have ended without Walker being fired if she had not gone back into the office, upon hearing Waxman refer to her as a "piss pot" or, if Walker's evidence is to be accepted, without responding to his threat to break her legs. In short counsel asks the Board to conclude that Walker was fired for her confrontation tactics and not for her union activity.

25. On the evidence presented, however, the Board cannot agree. In arguing with Walker just prior to discharging her, Waxman told Walker that she had been nothing but trouble since she came. Starr and Goldberg each testified, however, that they had no complaints with Walker's work or her general conduct in the office. Having carefully reviewed the evidence the Board is satisfied that the "trouble" referred to in Waxman's statement was Walker's leading role in bringing in and promoting the union. In the Board's assessment Waxman's obvious antagonism towards Walker would not reasonably have emanated from and cannot be explained by the circumstances of the meeting alone. Starr testified that he was well aware that Walker was the person mainly responsible for bringing in the union. As he expressed it, that awareness "grew on him". The Board concludes on the evidence that

Waxman was also well aware of Walker's leading role. Waxman was enraged by Walker's pronouncement on two separate occasions at the meeting that the union would hear about the way the company was treating her. It is apparent to the Board that Waxman was deeply angered by the introduction of an element into the office (the union) that would challenge his authority, and tagged Walker as the one responsible. Consistent with the Board's conclusion is Waxman's statement, "That little piss pot thinks she runs the office but she can't tell me what to do.". Further supporting the Board's conclusion is the unreasonableness of Waxman's instructions to Walker, soon after he entered the meeting and before they started shouting at one another. He told her not to come up to the third floor for any reason, not even to use the toilets. The Board does not accept that Waxman was motivated in making this comment by Walker's alleged insubordination. At this point in the meeting she had not even spoken to Waxman and Goldberg had just told Waxman that she felt an explanation to Walker was in order. Additionally, it is difficult to find a business justification for this instruction as it was admitted by all that she had to use the personnel files on the third floor at least once a day.

26. The situation before the Board is readily distinguishable from the circumstances in *W.C. Wood*, [1979] OLRB Rep. Dec. 1296 where the Board concluded that the grievor was discharged for confrontation tactics rather than union activity. While Walker was not reluctant to express her views or challenge what she perceived to be a misstatement of fact by management, the Board cannot conclude on the evidence that she engaged in concerted confrontation tactics or that her discharge was motivated by her alleged insubordination. The Board is fully satisfied that her discharge was predominately prompted by Waxman's anti-union *animus* in violation of *The Labour Relations Act*.

27. We turn then to the second complaint filed under section 79 of the Act relating to Ms. Hilda Rampersaud, an employee in the office bargaining unit who worked in the shipping room typing invoices. During the last week of October or first week of November of 1980, Waxman presented Rampersaud with the choice of either returning to a job in the factory, where she had been prior to moving into the office, or leaving the respondent's employ. Rampersaud declined to go back into the plant. Pursuant to the choice, therefore, she left. The union argues that the employer acted with anti-union *animus* in violation of *The Labour Relations Act* in presenting her with what it characterized as a choice between demotion and discharge. The employer, on the other hand, contends that the employer was motivated solely by business concerns. It is clear on the evidence that Rampersaud was away from work, due to the ill health of her infant child, for numerous days at the end of September and beginning of October. While it was readily acknowledged that, in general, the employer has a generous sick leave policy, counsel for the employer argued that the company could not tolerate Rampersaud's absences from work in the shipping room and sought, therefore, to move her to a place where her absences would not have such an adverse impact on the employer's business. Counsel maintains that during the period of her absences the company was in the midst of a very heavy shipping season and needed, on a daily basis, its full complement of shipping employees.

28. In support of its position, the union points to the fact that Rampersaud was one of two employees to sign re-affirmations of union support. The union argues that it was only after the Board held on October 24, 1980 that the two re-affirmations were voluntary that the employer took action against Rampersaud.

29. Early in the course of the Board's proceedings considerable concerns were raised in

the hearing by the objecting employees about the identity of the persons who had signed the two re-affirmations of union support. The employee objectors to the application stated that they had spoken to the employees involved and that a sufficient number had denied signing re-affirmations that it was impossible for the overlap to be sufficient to cause the petition to become numerically irrelevant. The objectors wanted to call the employees as witnesses to testify that they had not signed re-affirmations.

30. Because of the questions raised by the objectors at the Board's first hearing the Board, between hearings, conducted its own investigation to verify the accuracy of the signatures on the re-affirmations. When questions persisted at the second hearing it became obvious to the Board that one of the persons who had signed a re-affirmation of union support was concealing that fact from fellow employees. The Board takes every precaution to insure that the names of people who sign re-affirmations as well as petitions and membership cards are not revealed unnecessarily. Therefore, instead of calling the employees who had signed the petition to testify as requested by the objectors, the Board proposed that the Board in private, examine each employee to ascertain whether he or she had signed the re-affirmation. The parties, and in particular the objectors, agreed that they would be satisfied with the results of the Board's private inquiry, an inquiry which again confirmed the documents before the Board.

31. Immediately thereafter on Friday, October 24, 1980, the Board announced to the parties that the inquiry had confirmed the information in the documents received by the Board. The Board further announced that it had concluded on the evidence presented that the re-affirmations were voluntary and that, therefore, given the degree of overlap between the re-affirmations and the petition, the petition was not numerically relevant to the application because the union had at the relevant times 100% of the employees as members and the continued support for certification from more than 55% of the employees in the unit. According to the testimony of Goldberg it was in the next week that Waxman met with Rampersaud and presented her with the choice of going back to the factory or leaving her employment.

32. The union submits that the coincidence in the timing between the presentation of Waxman's choice to Rampersaud and the Board's inquiry relating to the re-affirmations and its related announcements undermines the credibility of the business explanation put forth by the company to justify Rampersaud's termination.

33. The end of September marks the company's fall shipping deadline. As a result, according to the testimony of both Starr and Goldberg, August, September and the first week of October are heavy shipping periods. John Jamison, who had previously worked in shipping and, as set out above, was sent there by Waxman's direction at the September 12th meeting, testified that while September is the busiest time in the shipping department, things slow down in October and November. Consistent with his testimony is the fact that he was returned to the office from the shipping department on October 8, 1980. The Board concludes on the evidence of Starr, Goldberg and Jamison that the shipping department did in fact slow down after the first week in October of 1980.

34. Goldberg testified that Rampersaud's baby was ill at the end of September and beginning of October. She further stated that Dennis Grady, the head shipper and a member of management, kept complaining that because of Rampersaud's absences he was having to do

the invoice typing. According to Goldberg he insisted that they needed someone to do the invoicing who would not be absent.

35. The Board has no doubt that Rampersaud's absences at the end of September and beginning of October were disruptive to the company occurring, as they did, during a peak shipping season. To further conclude that it was her absenteeism that motivated Waxman weeks later, at the end of October, to present her with the choice between leaving her employment or going back to the factory is more difficult. On management's own evidence as well as that on an objecting employee, the Board has already concluded that the shipping department had slowed down after the first week in October.

36. According to Goldberg, invoice typing has always been a problem with the company. Jamison testified that he helped Rampersaud with the invoice typing while he was there from September 12th to October 8th. If Rampersaud's absences during this period were causing such a problem for the company, the question is raised as to why Jamison would have been moved back to the office on October 8, 1980 instead of being maintained in shipping for a while longer. No adequate explanation was provided to the Board to explain this apparent inconsistency.

37. The evidence before the Board is that Rampersaud's absences were caused by her baby's illness rather than a recurring problem with her own health and that these absences occurred during the end of September and first week of October. Goldberg testified that her knowledge of the situation was second hand and that she had no record of the specific number of days Rampersaud was absent. According to Goldberg, Mr. Grady, the head shipper, was the person who would know what happened in the shipping department on a day to day basis. While Grady was the person who complained about Rampersaud's absences as well as the person who could best testify as to the problem her absences were causing the employer and the specific period(s) of time that Rampersaud was away from work, Grady did not testify. In the absence of any explanation the Board views adversely the fact that Grady was not called to give what would have been the best evidence of these events. Relying on the evidence that was presented, the Board can only conclude that Rampersaud's absences, save for one day on or about November 3, 1980, did not extend beyond the first week in October.

38. Maria DaSilva testified that between the first Board hearing on September 26, 1980 and the day she left her employment with the respondent on October 3, 1980 she overheard Starr and Waxman talking by the elevator while she was sitting at the reception desk. She told the Board that she heard them talking about who had signed the counter petition or reaffirmations of union support. According to DaSilva one person thought Rampersaud had signed and the other thought it was Jamison.

39. Starr denied that he engaged in such speculation. He acknowledged, however, both that he had heard that two people had signed counter petitions and that Waxman may have said, "Who do you think signed it?" to which he might have said, "I don't know." Goldberg testified that after the first two hearings (September 26 and October 15) Waxman, Starr and she wondered which person among those who had signed the petition against the union was lying about signing the counter petition. She stated that they couldn't understand why someone would be lying.

40. While Rampersaud was allegedly removed from the shipping department because

the department could not absorb a period of absenteeism from the person who does invoice typing, the evidence suggests that no one was hired specifically to replace her. Starr testified that he had no idea who had in fact replaced Rampersaud. Regarding the current situation Starr stated that to the best of his knowledge Grady, the head shipper, does the invoicing with others helping out. Grady did not testify as to what steps were taken by the company after Rampersaud's departure to insure that the problem created by Rampersaud's absences would not recur. Goldberg stated that an in-house sales person who had been hired about that time helps relieve Grady. From the evidence that was presented, the Board can only conclude that after Rampersaud's departure the company has managed its invoicing in much the same manner as it did when Rampersaud was absent from work.

41. Starr stated that he and Waxman discuss most decisions. He acknowledged, however, that beyond asking him whether he had room for Rampersaud in the factory, Waxman did not discuss with him the choice he was going to present her.

42. In the Board's opinion the company has not given a credible business explanation for why Waxman gave Rampersaud the choice of going back into the factory or leaving the company. The company has not shown that the shipping department was busy when Rampersaud was actually given her choice. In fact the weight of evidence is that the shipping department had slowed down after the first week in October. As well the evidence presented indicates that Rampersaud was not absent after the first week in October with the exception of one isolated day on November 3, 1980. Goldberg could not recall whether Rampersaud asked for the day off on November 3rd before or after Goldberg, pursuant to Waxman's instructions, had informed her that her last day of work would be November 7, 1980. On the totality of the evidence it is apparent that the November 3rd absence played no part in the company's decisions relating to Rampersaud.

43. Coupling these considerations with the timing of the presentation of the choice to Rampersaud, the Board can only conclude that Waxman was motivated by anti-union *animus* contrary to the Act. In the Board's opinion the respondent's actions with respect to Rampersaud constitute a force resignation tantamount to discharge in violation of sections 56 and 58 of the Act. We note that the fact that two re-affirmations of union support were signed does not detract from the Board's conclusion. The other person who signed the re-affirmation was no longer in the employ of the company at the relevant time.

44. For the reasons set out above, therefore, the Board concludes that the respondent acted contrary to sections 56, 58 and 61 of the Act both when on September 12, 1980 it relocated the work stations of both Walker and Jamison and when on September 16, 1980 it discharged Walker. The Board further concludes that the respondent acted contrary to sections 56 and 58 of the Act when in late October or early November of 1980 it presented Rampersaud with a choice that forced her resignation and may best be characterized as an effective dismissal.

45. By way of remedy for these violations the union makes numerous requests:

- (a) that Walker and Rampersaud be reinstated to the positions they held on the day of discharge and, for Walker, at the location where she was performing that job on September 21, 1980, namely the third floor rather than the second,

- (b) that Walker and Rampersaud be fully compensated for wages and benefits lost,
- (c) that they be awarded interest on the wage portion,
- (d) that Walker receive specific compensation of approximately \$7,500.00 for humiliation and loss of dignity. Supporting this claim counsel for the union relies particularly on the decision of the Ontario High Court in *Pilon and Peugeot* [1980] O.R. (2d) 711 as well as the Board's decision in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60,
- (e) that to assist the union to rebuild the strength and momentum it lost through the employer's unfair labour practices and interference with its organizing drive the Board order,
 - i) that the respondent post copies of the Board's order,
 - ii) that, due to the small size of the bargaining unit and work location of the employees therein, the respondent send copies of the notice to the home of all employees in the bargaining unit,
 - iii) that the respondent supply the union with a list of names and addresses of the person now in the bargaining unit,
 - iv) that the union be permitted to hold a meeting on the company's premises and during company time,
 - v) that the union be given reasonable access to the company's bulletin board,
 - vi) that the union be compensated for the added effort it must make to rebuilt its support in the bargaining unit, specifically, that the employer pay the union 30 days wages for a union representative to cover this added organizing expense.

46. The purpose of the Board's remedial power under section 79(4) of the Act is to compensate parties and persons by placing them, as nearly as possible, in the position they would have been in had the Act not been violated. Consistent with this principle and the Board's well established jurisprudence the Board orders that both Walker and Rampersaud be reinstated forthwith into the positions they held at the time of their dismissal. In view of the Board's finding that the respondent's decision to relocate Walker to the second floor was made in violation of the Act, the Board further orders that Walker resume her duties on the third floor where she had been working prior to the violation. The Board does not seek to restrain the *bona fide* operation of the respondent's business but rather to remedy the unfair labour practice which occurred on September 12, 1980 when Walker was moved to the second floor and away from the other employees in the bargaining unit. It may be that at some future date the employer may decide for *bona fide* business reasons that Walker's job should be performed

at a different location. Under what circumstances such a move would be appropriate in the future, however, is not in issue at this time.

47. Additionally, the Board orders that both Walker and Rampersaud be fully compensated for wages and benefits lost together with interest calculated pursuant to the principles set out in the Board's decision in *Hallowell House*, [1980] OLRB Rep. Jan. 35.

48. Relying on the Ontario Divisional Court's decision in *Pilon and Peugeot, supra*, and the Board decision in *K-Mart Canada, supra*, the union requested that Walker be compensated for what it characterized as an assault on her dignity. In *Pilon and Peugeot* the plaintiff was awarded \$7,500.00 for the mental distress, anxiety, vexation and frustration caused by the company's breach of contract and wrongful dismissal. Numerous factors readily distinguish the situation before the Board from the circumstances in that case. In *Peugot* the employee had seventeen years of service and had been told by the employer that he would have life time security in his employment. Walker, on the other hand, had less than one year's service and had been given no assurances about the duration of her employment. Additionally, in *Peugot*, evidence was presented establishing that the plaintiff's doctor, ten days after his discharge, diagnosed in the plaintiff an acute anxiety state. A year later the plaintiff was still suffering from chest pain, insomnia and sweating as a result of the dismissal. No medical evidence was presented in the instant matter to indicate what effect the discharge had on Walker. To all appearances, though, Walker is a person of particularly strong mental and emotional fiber. There was no suggestion in the evidence that she was suffering from any anxiety beyond the natural distress, which must not be underestimated, that accompanies any wrongful dismissal. Given these and other factual distinctions between the two cases the Board does not find support in the *Peugot* decision for the union's claim for compensation.

49. In *K-Mart, supra*, the Board ordered that two employees be compensated in the amount of \$500.00 for the employer's assault on their dignity. Subsequently, however, the Board decided not to implement this part of its decision [1981] OLRB Rep. Feb. 185. As the union has consented to an order of the Divisional Court staying the payment of the compensation pending judicial review, the immediate remedial impact of the order was removed. The Board, therefore, revoked that aspect of its decision pending further submissions of the parties. As the issue had not been fully argued before the Board in *K-Mart*, the Board noted that prior to making a further decision on the matter it would welcome submissions on the limits of its jurisdiction in this area.

50. The reasoning supporting the Board's original decision remains instructive. The Board emphasized that an award of that nature would be made in the most extraordinary circumstances. At p. 87 of its determination the Board explained the foundation of its decision.

Compensation for unfair labour practice involving an assault on an employee's dignity must be assessed carefully, and will be awarded only in the most extraordinary of cases. There are numbers of instances where an employee who is the victim of an unfair labour practice may incidentally suffer a loss of dignity or self-esteem. An employee who is discharged for organizing a union may suffer emotional stress as a result of his unemployment. In that instance, however, it is the discharge itself that is the violation of *The Labour Relations Act*. The remedy should be tailored to the wrong. The breach of that employee's right not to be so

discharged can be remedied by his reinstatement with full compensation for all wages and benefits lost.

Different considerations apply when, as in this case, a calculated offence to the dignity of the individual is the very means by which an unfair labour practice is achieved. If the Act is truly to provide protection from that kind of abuse and, for the reasons explored above, a declaration, a cease and desist order, a posting or apology will not be appropriate to redress the wrong done, a remedial order must include the possibility of monetary compensation. Where an employer has subjected employees to public indignity as a deliberate means of furthering its unlawful purpose and the Board concludes that no other remedy will adequately redress that particular unfair labour practice, it may deem it appropriate to order the compensation of the victimized employees to remedy the infringement of their rights under *The Labour Relations Act*. We are satisfied that this is such a case. The Board's remedy in this case, therefore, will include payment of compensation to Miss Kelly O'Connor and Mrs. Beverley Clark for humiliation and harassment to which they are subjected by K-Mart of Canada Limited. An incidental effect of such compensation will also be to counter the impact of the surveillance on other employees. In terms that the employees can readily understand, the two employees concerned will be compensated and be seen to be compensated by this Board in a way that should enhance the effect of the Board's posting order. All of the employees should know that such abuses will not go uncorrected. While such compensation is not easy to quantify, an elaboration of the Board's principles in this regard should await the experience of further cases, we are satisfied that in the circumstances of this case the sum of \$550 to each of Miss O'Connor and Mrs. Clark is an appropriate amount of compensation.

Unlike the circumstances in *K-Mart*, the respondent's "assault" on Walker's dignity was not the very means by which the employer's unfair labour practices were achieved; it was instead a by-product. Unfortunately it is not unusual for an employee who is discharged for organizing a union to be subject to a loss of self-esteem or dignity either by the loss of employment itself or by the process through which the discharge has been carried out. However, where the Board concludes that it is the discharge itself that constitutes the unfair labour practice and not the means by which it was carried out, reinstatement with full compensation will normally remedy the violation of the Act as it affects the individual. In *K-Mart*, the employees in question were not discharged from their employment, and could not therefore be made whole by an order for reinstatement.

51. In this case the Board is satisfied that the wrong done to Walker can be adequately redressed by an order of reinstatement with full compensation. The Board's remedial powers under section 79(4) are not designed to punish an employer who has violated the Act. As well the Board, in designing its remedy must be mindful of the process. The parties in the instant case are beginning their bargaining relationship. The settlement of these unfair labour practice complaints marks an important step in the commencement of a relationship that will demand maturity and good will from everyone involved. The Board is of the view that in this case it would only serve to hinder the development of the relationship to order compensation for loss of dignity in addition to Walker's reinstatement with full compensation.

52. The rest of the union's claim for relief is directed at restoring strength to the union. It is evident that the employer's unfair labour practices broke the union's momentum and weakened its strength. When the union filed its application for certification it had 100% support from among the employees in the bargaining unit. Of the original seven employees, two quit their employment within a month of the union's application. It is apparent on the evidence that the tension in the office resulting from the employer's violations of the Act was largely responsible for the departure of these employees. Of the remaining five, two were dismissed in violation of the Act and two others appeared throughout the hearing as employee objectors. On the day the employer received the application for certification, one of the objectors was brought into the office where Waxman asked what she knew about the union and inquired as to whether she had joined. The other objector was relocated by the respondent in what the Board has concluded was a violation of the Act. Ms. Alsop, the final employee who was in the bargaining unit on the day the application was made, was not untouched by the employer's inappropriate reaction to the union. Just after Waxman sent Walker away from Goldberg's office on September 16, 1980 and just prior to Walker's return and subsequent firing, Waxman screamed at Alsop demanding whether she had any problems. Goldberg testified that Alsop didn't answer and appeared to be terrified.

53. In these circumstances the Board is satisfied that part of the remedy for the employer's violations of the Act, specifically its interference with the employees' selection of the trade union contrary to section 56 and 58 of the Act, must be directed at restoring the union to its original strength amongst employees. The Board's normal posting order is manifestly appropriate as a means of dispelling the fears of employees who were witness to the employers' unfair labour practices. The posting is designed to assure them that they will not suffer relocation, intimidation or discharge at the hands of the employer because of their association with the union. In *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254 the Board at p. 1269 made the following comment on the need for and objective of what has become the Board's standard posting order:

However, the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is like to have a significant "chilling effect" on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. The mere reinstatement of the employee directly affected, with backpay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist for those occasions where he will not. ... One of the unique remedies developed by labour relations agencies to respond to the psychological impact of unfair labour practices requires the offender, whether employer or union, to communicate to employees affected by an unfair labour practice that it has been found guilty of violating statutory labour laws and that it will henceforth conform to their requirements. ... Making employees aware of the fact that an errant employer or trade union cannot violate the Act and that the employee has meaningful legal rights is vital to the success of *The Labour Relations Act*. Admittedly, the effect of the posting requirement often will be difficult to evaluate but this

is no reason for inaction. Surely, for example, the fear for job security will be lessened with the realization that someone more authoritative than the employer has a voice in determining what he can do to those who support a trade union and that someone more powerful than a trade union will protect those who lawfully oppose it. Even a belated notice is better than none, if it helps to dispel any fears, confusion or ill-will created by a situation which has been equitably resolved.

54. In the circumstances of this case the Board has determined that the posting order alone is insufficient to place the union in the position it would have been in had the employer not violated the Act. The Board has reached this conclusion on the basis of the cumulative effect of the following: the small size of the bargaining unit, the fact that the employees witnessed both the employer's wrongful relocation of two employees and the intimidating discharge of Walker, the occurrence of a further unfair labour practice months after the initial notification of the application for certification and, finally, the broad chilling effect that these unfair labour practices actually had on the union's campaign. To more fully reassure the employees that their association with the union will not bring reprisals from their employer, the Board directs the respondent to send the posting order to the home of each employee in the bargaining unit and to enable the union to hold a meeting of the employees in the bargaining unit on the company's premises, on company time. As well the union will be given reasonable access to the company's bulletin board to communicate with the employees during the process of negotiating for their first collective agreement. The Board further orders that the employer supply the union with the names and addresses of all employees who are presently in the bargaining unit.

55. The anticipated effectiveness of these remedies together with the Board's order reinstating Walker and Rampersaud with full compensation satisfies the Board that it would exceed the bounds of appropriate compensation to further order, as requested by the union, that a union representative be compensated for one month's wages for additional organizing expenses. In support of its request for a month's wages for a union representative, counsel for the union pointed to the decision of the British Columbia Labour Relations Board in *Delta Optimist and Ernest Bexley and Vancouver — New Westminster Newspaper Guild, Local 115* [1980] 2 Can LRBR 227. In that case, however the Board was responding to unfair labour practices which had occurred after the Board certified the applicant and after the initial alleged unfair labour practices accompanying the union's organizational drive had been settled. It would appear from the decision that the union's problem in *Delta* had developed far beyond the situation confronting the union in this case. Additionally, with a remedy such as this it is difficult to quantify the added union expenses directly attributable to the employer's unfair labour practices. While in the right case this may not be an insurmountable problem (see for example the Board's decision in *Radio Shack, supra*), the Board is satisfied that in the circumstances of this case it would be inappropriate to make such an order.

56. We turn then to the final matter, the union's application for consent to prosecute. The granting of consent to prosecute is a matter within the discretion of the Board. Even when a violation of the Act has been established, as in this case, or when there is *prima facie* evidence of a violation, the Board will decline to grant its consent to prosecute unless it is satisfied that to do so will further the labour relations interests of the parties or generally advance the interests of collective bargaining. (See *Arthur G. McKee and Company Canada Limited*, [1976] OLRB Rep. Oct. 637 and the cases cited therein; *Fleck Manufacturing Company*,

[1978] OLRB Rep. July 615; *Cuddy Food Products Limited*, [1979] OLRB Rep. Jan. 24 and *Cameron Packaging Inc.*, [1979] OLRB Rep. July 614.) In *Cuddy Food Products* the Board found that the employer had violated the Act by discharging three employees. The Board refused to grant consent to prosecute, however, because it did not feel that such "extreme recourse [was] necessary to advance the relationships of the parties or to protect the interests of the collective bargaining generally in the province". At p. 27 the Board explained its rationale as follows:

In this case the parties are new to their relationship and it is fair to say that the birth of that relationship has not been smooth. An initial application for certification was dismissed for a want of integrity in the membership evidence filed (Board file 0466-78-R, October 4, 1978). On a subsequent application a certificate was granted in proceedings marked with considerable resistance by the employer (Board file 1164-78-R, November 15, 1978). These and other section 79 complaints were filed with the Board. It is hoped that the disposition of the section 79 complaints will clear the air and allow the parties to put the past behind them and move forward to a positive bargaining relationship. It would be premature at this time to conclude that the remedies under section 79 of the Act are not sufficient to re-orient the parties in their future dealing with each other. A criminal prosecution would only risk further deterioration of their bargaining relationship at a time when they should be exploring more positive avenues of understanding. The request for the Board's consent to institute a prosecution is therefore denied.

57. The Board takes a similar view of the situation in this case. The parties are in the infancy of their collective bargaining relationship as it relates to this bargaining unit. The union has been certified and the parties are bargaining for their first collective agreement. While the establishment of their relationship has been accompanied by difficulties, the Board has confidence in the effectiveness of the remedies it has already granted. To clear the path for a criminal prosecution at this point would do little to foster mutual respect and promote a positive attitude between the parties. If problems arise in the course of bargaining avenues of recourse are available. The Board, however, will not anticipate such problems.

58. The request for the Board's consent to institute a prosecute is denied.

59. To summarize the Board orders that,

- (i) Jane Walker and Hilda Rampersaud be reinstated forthwith into the positions they held at the time of their dismissal.
- (ii) Jane Walker resume her duties on the third floor where she had been working prior to her relocation,
- (iii) Jane Walker and Hilda Rampersaud be fully compensated for wages and benefits lost,
- (iv) Jane Walker and Hilda Rampersaud receive interest on the wage portion of the compensation order,

- (v) the employer post copies of the attached notice marked, "Appendix" after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees including all places where notices to employees are customarily posted; that the notices be kept posted; that the notices be kept posted for sixty consecutive working days; that reasonable steps be taken by the respondent to insure that the said notices are not altered, defaced, or covered by any other material; that reasonable physical access to the premises be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with,
- (vi) the employer, at its own expenses, mail a copy of the posting order to the home address of each employee in the bargaining unit,
- (vii) the respondent permit, forthwith, at least two representatives of the union to meet with the employees in the bargaining unit, on company premises, during working hours for at least one hour,
- (viii) the union be given reasonable access to the company's bulletin board to communicate with employees about union affairs at least during the process of negotiating for their first collective agreement or for a period of one year from the date hereof whichever occurs first, and
- (ix) the employer supply the union with the names and addresses of the employees presently in the bargaining unit.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I agree with the findings of fact in the award of Vice-Chairman P. Picher, but have the following comments with respect to the relief sought by and granted to the union.

2. To my mind the concept of general damages as enunciated in the *Peugot* case and applied by this Board in the *K-Mart* case, *supra*, serves no useful purpose from a labour relations viewpoint. To become involved in every case with an assessment of the facts to see if such damages are warranted and then attempting to quantify the harm in money terms, would move the Board out of the specific legal area in which lies its expertise and into areas of law where another forum is best suited to deal with the alleged harm.

3. Lastly, I do not feel the union should be given access to the company's bulletin board for the posting of union notices. This remedy pre-supposes that the company will bargain in bad faith for a collective agreement and is not consistent with the remedial intent of restoring the union to its original strength at the outset of negotiations.

The Labour Relations Act

924

NOTICE TO EMPLOYEES**Posted by Order of the Ontario Labour Relations Board**

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT RELOCATE THE WORK STATIONS OF ANY EMPLOYEES BECAUSE THEY HAVE CHOSEN THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION AS THEIR BARGAINING REPRESENTATIVE.

WE WILL NOT DISCHARGE ANY EMPLOYEE BECAUSE HE OR SHE HAS SELECTED THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION AS HIS OR HER BARGAINING AGENT.

WE WILL NOT PRESENT ANY EMPLOYEE WITH A CHOICE THAT WOULD FORCE THAT EMPLOYEE TO EITHER QUIT HIS OR HER EMPLOYMENT OR MOVE TO THE FACTORY BECAUSE THE EMPLOYEE HAS CHOSEN TO BE REPRESENTED BY THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION.

WE WILL OFFER, FORTHWITH, TO REINSTATE JANE WALKER AND HILDA RAMPERSAUD TO THE POSITIONS THEY HAD AT THE TIME OF THEIR DISMISSALS.

WE WILL FULLY COMPENSATE JANE WALKER AND HILDA RAMPERSAUD FOR WAGES AND BENEFITS LOST, INCLUDING INTEREST.

WE WILL PERMIT TWO REPRESENTATIVES OF THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION TO MEET WITH THE EMPLOYEES IN THE BARGAINING UNIT WITHOUT LOSS OF PAY, ON COMPANY PREMISES AND DURING WORKING HOURS.

WE WILL PROVIDE THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION WITH REASONABLE ACCESS TO THE EMPLOYEE NOTICE BOARD AS ORDERED BY THE BOARD.

WE WILL SUPPLY THE UNION WITH NAMES AND ADDRESSES OF THE EMPLOYEES IN THE BARGAINING UNIT ON THE DATE HEREOF.

WE WILL BARGAIN IN GOOD FAITH WITH THE UNION AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.

NEWPORT SPORTSWEAR LIMITED

PER: AUTHORIZED REPRESENTATIVE

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

0239-81-R International Ladies' Garment Workers' Applicant, v. Omega Neckwear and Apparel Limited, Respondent, v. Group of Employees, Objectors.

Petition – Rumours about reducing hours at time petition circulated – Whether petition voluntary

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *A. M. Minsky, L. Goguen, D. Butler and Morris Fuchs and Michael Reynolds for the respondent; Marc Linett, Fred Stein and Helena Ferreira for the objectors.*

DECISION OF VICE-CHAIRMAN R. D. HOWE AND BOARD MEMBER W. F. RUTHERFORD:

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1 (1)(n) of *The Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, mechanics, designers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. There were filed in this matter, in timely fashion, three handwritten documents (hereinafter referred to as the "petitions") expressing opposition to the certification of the applicant trade union in the following terms: "WE WORK FOR OMEGA NECKWEAR AND DO NOT WANT ANY UNION HERE".
5. In the absence of the petitions, which contain a total of seventy-three names, forty-one of which coincide with the names of those who signed membership cards, the applicant would be entitled to be certified without a representation vote. However, the overlap between the persons who signed membership cards in the applicant and the persons who signed the petitions is sufficient that the Board would exercise its discretion to direct a representation vote if the Board were satisfied of the voluntariness of the petition. Accordingly, the usual inquiry (into the origination of the petitions and the manner in which each signature on them was obtained) contemplated by Rule 48 of the Rules of Procedure was conducted.
6. The petitions were circulated primarily by Helena Ferreira and Lucy Macri, both of whom are employed as shippers in the respondent's plant at which neckties and other accessories are manufactured. The heading quoted above that appears on each of the petitions was composed by Fred Stein, a shipper and receiver employed by the respondent. Mr. Stein testified that it is "a matter of public record" that he is strongly opposed to unions. He advised the Board that he "used to be a right wing commentator" on a local television station and that he has also written "an anti-union play". When he became aware through Ms. Macri, who prior to her involvement with the petitions was one of the employees of the respondent who assisted the applicant with its organizational campaign, and through other union supporters

that the applicant “was going to make a bid for certification”, Mr. Stein asked his brother-in-law (who is a vice-president of a large corporation) and some of his social acquaintances “if anything could be done to prevent it.” They informed him of the Board’s petition procedure which, he testified, “was confirmed” by the “green sheet” (Notice to Employees of Application for Certification and Hearing) that was posted on the respondent’s premises on Tuesday, May 5, 1981 at approximately 11:00 a.m. Other sources of information concerning petitions were Ms. Ferreira’s husband, who was the president of a local of the United Steel Workers of America for a period of five years, and Herman Stewart, an organizer employed by the applicant trade union, who informed Ms. Macri on April 28 of the petition process as a possible avenue of relief for persons who had signed union cards and subsequently wished to “back off” but did not want their names revealed to Mr. Stewart.

7. When Ms. Ferreira, whose native language is Portuguese, and Ms. Macri, whose mother tongue is Italian, read the description of the bargaining unit on the green sheet (which description was identical to the bargaining unit description set forth in paragraph three of this decision), they interpreted it to mean that if the union were to be certified, the respondent’s employees, all of whom generally worked forty or more hours per week, would be reduced to a maximum of twenty-four hours per week with the balance of their normal hours being worked by students. Upon reading the green sheet with the assistance of Ms. Macri and forming that view of its meaning, Ms. Ferreira informed a number of employees, who gathered nearby, what she understood it to mean. It is evident from Ms. Ferreira’s testimony that a substantial number of employees were present when she expressed that interpretation. She testified that “all the people were standing by the (green) paper talking about it.” She also told the Board: “When I first saw it (the green sheet), I thought the twenty-four hours was what we would be working and the students would be working the rest. . . . I got that understanding. Most of the people were talking about it.” In assessing the potential impact of such statement, it is important to note that a number of the employees in the respondent’s plant are unable to read English. Accordingly, those people rely upon persons such as Ms. Ferreira and Ms. Macri for explanations of the effect of documents such as the Board’s notice. Moreover, it was Ms. Ferreira’s evidence that employees tend to look to her for advice. She stated: “I’m the oldest one working there (in the shipping department). If they have any doubts about how to ship something, they ask me. If I don’t know, I send them to ask the foreman.”

8. During the employees’ lunch break on May 5, Mr. Stein composed the petition heading and wrote it on a slip of paper, from which it was copied onto each of the three petitions by Ms. Ferreira. It was the evidence of Ms. Ferreira, whose job requires her to “move around the plant” from time to time, that during the remainder of that day and during the following two days, she personally witnessed at least sixty-one of the seventy-three signatures on the petitions. Ms. Macri was also present when a number of the signatures on the petitions were obtained. Ms. Ferreira testified that most of the signatures on the petitions were obtained on the premises of the respondent before work, during (morning, lunch and afternoon) breaks and after work, in plant washrooms, behind boxes and piles of material, and in other locations out of the view of forepersons and other members of management. Ms. Ferreira and Ms. Macri told a number of employees who signed the petition that if the union obtained bargaining rights, they could not work any more than twenty-four hours per week and that students would work the rest of their normal hours. Under the circumstances, it is reasonable to infer that the misinformation in question spread rapidly to many of the employees in the plant, as did the information that Ms. Ferreira and Ms. Macri were circulating a petition, as evidenced by the fact that a number of employees approached them and requested an

opportunity to sign it. Mr. Stein testified that he told Ms. Ferreira “at the end of May 5 or the beginning of May 6” that her interpretation of the information on the green sheet was incorrect. However, Ms. Ferreira made no mention of that conversation in her testimony. In fact, it was her evidence that she did not realize that she had misinterpreted the green sheet until she and other employees “received papers in Italian, Portuguese and Chinese”. Those “papers” were sheets prepared and distributed by the applicant in an attempt to correct the misinformation which was circulating in the plant. The papers contained the following information in English, Italian, Portuguese and Chinese on photocopies of the applicant’s letterhead:

“CONTRARY TO WHAT YOU HAVE BEEN TOLD, THE UNIOIN
COMING TO OMEGA DOES NOT MEAN YOU WILL BE
WORKING ONLY 24 HOURS PER WEEK.

THE 24 HOURS MENTIONED ON THE APPLICATION FOR
CERTIFICATION (PAPER POSTED ON THE NOTICEBOARD)
MEANS THAT PART TIME WORKERS WILL NOT BE IN THE
UNION.

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE PHONE
THE UNION.

REMEMBER THE UNION HAS ENOUGH SIGNATURES TO BE
CERTIFIED.

HERMAN STEWART
977-1384

LEN GOGUEN
977-1384”

Ms. Ferreira testified that after she received those papers “on May 6”, she “went around (to people who had signed a petition) and asked them if they still wanted to back off (from the union)” by saying to them: “If you want to back off (from the petition), here’s the paper; you can take your name off.” Ms. Macri also testified that she received the “papers” from the union before she mailed the petitions to the Board. However, her ability to recall dates and other details concerning the origination and circulation of the petition and other relevant matters was quite limited. Mr. Stewart, who gave his evidence in a very candid and forthright manner, testified that the “papers” were not distributed until about 4:30 p.m. on May 7, 1981 when they were handed out to employees as they left the plant. It was his evidence that he was first told about the “twenty-four hour confusion” late in the afternoon on Wednesday, May 6. After “hearing the same thing (on the evening of May 6) from a lot of people about only twenty-four hours per week”, Mr. Stewart prepared the English part of the “papers” on the morning of May 7. After spending several hours arranging for the Portuguese, Italian and Chinese translations, he made one hundred and twenty photocopies of the documents and attended at the respondent’s plant at approximately “4:20 or 4:25 p.m.” on May 7 to distribute the photocopies to employees as they left the plant. Mr. Stewart attempted to have the papers prepared more quickly but was thwarted in his efforts by difficulties in obtaining the necessary translations. Although the terminal date fixed for this application (and specified on the green sheet) was May 12, 1981, the petitions were mailed to the Board at approximately 4:20 p.m. on May 7 by Ms. Macri and Severino Fedrizzi, another employee of the respondent. Mr. Fedrizzi, who was called as a witness by the objectors, testified that he did not receive the “papers” from the union until after the petitions had been mailed to the Board.

9. Having regard to all of the evidence before it, the Board finds that the union “papers” in question were not distributed to any of the employees of the respondent until after the petitions had been mailed to the Board. Thus, Ms. Ferreira could not have “[gone] back around” with the petitions after she received those papers as she testified. Moreover, her testimony that she “never told anyone” that the union coming to Omega would mean that they would only be permitted to work twenty-four hours per week was contradicted by the evidence of several other witnesses, who further testified that after they signed the petition, Ms. Ferreira neither approached them to correct the misinformation nor provided them with any opportunity to remove their signatures from the petition. Having regard to those matters and to her demeanour while testifying, the Board is of the view that Ms. Ferreira was not a reliable witness.

10. Having regard to all the evidence before it, the Board finds that Ms. Ferreira did tell a number of employees that if the union was certified, their hours of work would be reduced to twenty-four hours per week. The Board further finds that employees were not afforded any opportunity to delete their names from the petitions after the misinformation was corrected as the correction did not occur until after the petition had been mailed to the Board. Indeed, the evidence indicates that when Mary Said, an employee who signed the petition “because she didn’t want to work twenty-four hours per week” subsequently changed her mind and approached Ms. Ferreira to tell her that she (Ms. Said) “wanted to have [her] name off” the petition, Ms. Ferreira refused to permit her to delete her signature from the petition.

11. It was also Mr. Stein’s evidence that he explained to Ms. Macri before or shortly after the petition started to be signed that the idea that employees would only work twenty-four hours per week if the union was certified was “nonsense”. However, Ms. Macri did not mention that in her evidence before the Board. Moreover, she conceded in cross-examination that she told some of the employees who signed the petition that “if the union got in, [they] would be working only twenty-four hours and the students would get the rest.” She also testified that some employees expressed that view themselves without any mention of it on her part, and that others raised the matter by asking her about it.

12. It is not possible for the Board to determine on the evidence before it how many of the employees who signed a petition were induced to do so in whole or in part by the aforementioned misinformation. There were, no doubt, some employees such as Mr. Stein, who would have signed a petition regardless of whether they believed or even heard the misinformation. However, four employees called by the union as witnesses in this case testified that they signed a petition because they were told by Ms. Ferreira or Ms. Macri, and believed, that if the union obtained bargaining rights, they would be reduced to twenty-four hours per week. In the circumstances of this case, it is reasonable to infer that other employees were also induced to sign a petition in whole or in part by this misinformation, which presented them with the apparent necessity of choosing between union representation and full-time employment.

13. Connie Pereira, who works as an operator in the respondent’s cutting room, also witnessed some of the signatures on the petitions. It was her evidence that “a lot of . . . employees were talking about” a rumour that Ms. Ferreira was going to be paid \$400.00 by Morris Fuchs, the President of the respondent, for circulating a petition. She testified that she overheard approximately eight employees say that “the boss would pay \$400.00 to Helena Ferreira to take up the petition against the union.” Although Ms. Pereira did not herself

believe the rumour to be true, there is no evidence which indicates that the other eight employees were of similar mind, nor is there any evidence that indicates how widespread that rumour was in the plant. In fairness to Mr. Fuchs and the respondent, it should be noted that there is no evidence whatsoever that he or any other member of management ever offered any monetary or other form of reward or encouragement to Ms. Ferreira or to anyone else with respect to originating or circulating a petition. Indeed, we accept without hesitation or reservation his credible testimony that he was unaware of the existence of any petition until the respondent was notified by the Registrar of the Board that three petitions had been filed with the Board in this matter. However, the existence of that pernicious rumour at the time the petitions were being circulated causes the Board to be concerned that at least some of the employees may have signed the petition out of a reasonable concern that a failure to sign might come to the attention of management. Two of the employees who signed a petition after signing union cards testified that they did not hear any rumours that their hours of work would be reduced if the union was certified. Each of those two employees told the Board that she signed the petition because she “changed [her] mind” after discussing the matter with her father. The marked similarity of their testimony gives rise to some legitimate scepticism with respect to the reliability of their evidence in this regard. Moreover, there is no evidence before the Board concerning whether or not those employees heard the rumour that Ms. Ferreira was going to be paid by Mr. Fuchs to circulate the petition. Accordingly, the Board is unable to conclude on the balance of probabilities that such rumour did not in any way influence their decision to sign a petition against the union.

14. The Board has long recognized the responsive nature of the relationship between employees and their employer and the natural desire of employees to want to appear to identify themselves with the interests and wishes of their employer. See, for example, *Piggott Motors*, 63 CLLC ¶16,264. See also *Radio Shack*, [1978] OLRB Rep. Nov. 1043, in which the Board stated, at paragraph 24:

“Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* [1975] OLRB Rep. Nov. 813 and the cases cited therein.)”

15. The burden of proving on the balance of probabilities that a petition represents a voluntary statement of desire on the part of the employees that signed it lies upon the objectors (see *Leamington Vegetables Growers Co-operative Limited*, [1974] OLRB Rep. June 402; *Willow Manufacturing Company Limited*, [1980] OLRB Rep. July 1131; and *Fibre Therm Corp.*, [1980] OLRB Rep. Aug. 1196). Having regard to all of the evidence before it and the submissions of the parties, and having particular regard to the unreliability of the evidence of Ms. Ferreira, who was the primary circulator of the petition, and to the existence in the plant while the petitions were being circulated of the rumours that Ms. Ferreira was going to be paid

by Mr. Fuchs for circulating the petitions and that if the union was certified full-time employees would be reduced to twenty-four hours per week, the Board finds that the objectors have not discharged that burden in this case. Accordingly, the Board, in the exercise of its discretion under section 7(2) of the Act, declines to direct that a representation vote be taken.

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 12, 1981, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER J.D. BELL:

1. I disagree with the decision of the majority of the Board. They decided to give no weight to a petition signed by seventy-three employees out of a potential unit of ninety-five. Forty-one employees who had signed union cards out of a total of fifty-five submitted by the union in support of its application were signatories to this petition. Three signatures would reduce the support of the union to less than fifty-five per cent.

2. The majority decision quotes paragraph 24 of *Radio Shack*, which details the criteria the Board considers in determining the voluntariness on the part of the employees who sign a petition. They found in paragraph 13 of their decision that the respondent did not have a hand in the origination, preparation or circulation of the petition. They stated in part:

“In fairness to Mr. Fuchs and the respondent, it should be noted that there is no evidence whatsoever that he or any other member of management ever offered any monetary or other form of reward or encouragement to Ms. Ferreira or to anyone else with respect to originating or circulating a petition. Indeed, we accept without hesitation or reservation his credible testimony that he was unaware of the existence of any petition until the respondent was notified by the Registrar of the Board that three petitions had been filed with the Board in this matter.”

3. Rumours in the work place in the three days following the posting on the bulletin boards of the Board's official notice, Form 5, may be described as wild. This official document was in English only. It was read and interpreted by employees, the majority of them having a first language which is not English. A number of the employees do not read or speak English and were dependent on fellow employees to translate and explain it to them. Several persons, including Ms. Ferreira, thought that the notice said that if the union succeeded they would work only twenty-four hours per week and students would be employed for the remainder of the week. This rumour started May 5th and was not completely dispelled until May 7th. The union became aware of this rumour and reacted by promptly issuing a May 7th bulletin in four languages. This was probably the most positive action taken to dispel this rumour. The union, having taken this action, then began to solicit revocations from those it felt may have signed the petition. The union had five days remaining to do so, but only seven revocations were filed with the Board.

4. The rumours that circulated among the employees have caused the majority of the Board to be concerned that it may have been for this reason that some employees signed the petition. This concern may be valid but one cannot ignore the evidence of four employees who appeared as witnesses and were subjected to lengthy cross-examination. These four employees stated that they had signed the petition because they had changed their minds for various reasons. This was undisputed evidence from four individuals who had signed union cards. Their action alone is sufficient to reduce the level of support for the union to less than fifty-five per cent.

5. The differences between the groups of employees may have been as a result of a wrong interpretation of the Board's official notice or because of the language barrier or because of peer pressure or some other reasons, but not as a result of any actions of the respondent. The Board must be very careful not to favour any one group of employees in a matter such as this, but must endeavour to determine the true wishes of the majority. Therefore I would order that a representation vote by secret ballot be held. I would not be blinded by a technicality that the objectors may not have discharged their legal burden of proof re the voluntariness of the total petition filed.

**2620-80-M Canadian Union of Public Employees Local 1000,
Applicant, v. Ontario Hydro, Respondent, v. London Monenco
Consultants Limited, Intervener.**

Employee – Reference – Whether dispute as to identity of employer properly subject of section 95 (2) reference

BEFORE: R. D. Howe, Vice-Chairman, and Board Members B. L. Armstrong and J. A. Ronson.

APPEARANCES: *Jeffrey Egner for the applicant; Janice A. Baker and Marjorie Chatland for the respondent; Martin Addario and J. Turner-Bone for the intervener.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG;

1. This is an application under section 95(2) of *The Labour Relations Act* in which the applicant requests the Board to determine whether or not certain persons are employees of the respondent. The application, which was filed on March 3, 1981, names forty-two persons whom, it is alleged, are employed by the respondent at its Thunder Bay thermal generating station in various classifications.

2. In its March 13, 1981 letter of reply to the application, the respondent denied that the persons set out in the application are employees of the respondent, and reserved the right to make further comments at any subsequent hearings or examinations inquiring into the matter.

3. On March 25, 1981, the Board endorsed the record in this matter as follows:

“The Board appoints Mr. J. Bowman, Labour Relations Officers, to inquire into the changes in duties and responsibilities of the individuals named in the application, since the date of entering into the current collective agreement between the parties.”

The appointment was limited to “*Changes* in duties and responsibilities” in accordance with the Board’s general practice as set forth in *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572, in which the Board stated, at paragraph 4:

“... Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a ‘question’ exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. The Board will not, however, permit an application (other than one relating to *changes* in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18). Nor will it permit a full application to be brought during the term of the collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 95(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board Officer in inquiring into *changes* in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560). If the applicant feels that the appointment should not be limited to ‘changes’, it may write to the Board setting out its reasons, and the Board may hold a hearing to deal with the proper terms of the appointment.”

4. On March 18, 1981, the intervener contacted the Registrar to request details as to the contents of the application. In its written request for that information, the intervener stated that it had reason to believe that its employees had been identified in the application. In the intervention which it subsequently filed in this matter, the intervener states, *inter alia*, that several of its employees are identified in the application, and “admits” that those persons are “employees” for purposes of the Act.

5. At a meeting convened by the Labour Relations Officer on June 10, 1981 pursuant to his aforementioned appointment, the respondent raised an objection to any further proceedings by way of examination in this matter on the ground that there is no “question” between the applicant and the respondent as to whether any of the specified persons was an “employee” pursuant to section 95(2) and that, accordingly, the Officer had no jurisdiction to embark upon an examination.

6. The Board subsequently scheduled a hearing for the purpose of providing the parties with an opportunity to make representations with respect to that objection.

7. Counsel for the respondent contends that, with the exception of one person named in the application (W. Steasiw), the persons listed in the application were not employees of the respondent on the date of this application. Implicit in her submissions is the suggestion that prior to and at the time of the application, most of the persons in question were employees of the intervener which (it is submitted) supplied and performed engineering services for the respondent with regard to an extension of the respondent’s Thunder Bay generating station. She advised the Board that it is the respondent’s position that although the persons in question are employees within the meaning of *The Labour Relations Act*, they are not employees of the respondent. She further argued that since the respondent has conceded that the persons in question are “employees” within the meaning of the Act and would have been considered and treated as such by the respondent if they were employed by the respondent, there is, therefore, no “question” between the parties pursuant to section 95(2). Accordingly, she submitted that the Board Officer has no jurisdiction to enter into an inquiry and that this application should be dismissed. Counsel also submitted that the real question in dispute between the applicant and the respondent is whether the employees in question are covered by the Collective Agreement between the applicant and the respondent. That Agreement dated November 12, 1980, provides that it shall be effective as of April 1, 1980 and shall remain in effect until March 31, 1982. However, she conceded that (with the exception of certain persons who perform clerical duties) most of the persons in question would be covered by that Collective Agreement if they were employed by the respondent. She also expressed the view that the matter should be resolved by arbitration under that Collective Agreement and undertook on behalf of the respondent that it would not raise a jurisdictional objection if the application pursued that avenue of potential redress.

8. Counsel for the intervener submitted that the question in issue is the identity of the employer of the persons in question. It was his position that although the Board may have jurisdiction to deal with that issue in other proceedings, such as a certification application, an application for a declaration under section 1(4) or jurisdictional dispute proceedings under section 81, it does not have jurisdiction to do so under section 95(2).

9. Counsel for the applicant argued that the issue of whether the persons in question are employees of the respondent can and should be decided by the Board pursuant to section 95(2) of the Act, and cited several decisions in support of that submission. On the basis of those authorities, he contended that the respondent’s “platonic” admission that the persons in question are employees within the meaning of the Act is meaningless and does not preclude the Board from entertaining this application. He further submitted that the terms of reference of the Board Officer’s appointment should be amended to reflect the true issue between the parties. He argued that the issue before the Board is separate and distinct from the issue of whether the persons in question are covered by the applicant’s Collective Agreement with the respondent or by any other collective agreement. It was his position that the determination of

the threshold issue of whether they are employees of the respondent would serve a useful purpose. He further submitted that the Board's inquiry process through a Board Officer offers practical advantages over arbitration procedures. In response to a concern raised by Board Member Ronson that the applicant might be attempting to use section 95(2) to, in effect, obtain a section 1(4) declaration that the respondent and the intervener constitute one employer for the purposes of the Act, counsel for the applicant advised the Board that he is not asking it to "pierce any corporate veils" or to otherwise apply section 1(4) since it is his position that "section 1(4) would not be appropriate" as the persons in question are "in fact and in law" employees of the respondent.

10. Section 95(2) provides:

"If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes."

11. As indicated by the Board in *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500, once a collective agreement has been entered into, a subsequent dispute as to whether or not a particular person is included in the bargaining unit often involves two questions: (1) whether the person is an "employee"; and (2) whether the person is covered by the collective agreement itself, having regard to the language of the "scope" clause of that agreement and any factors relevant to its interpretation. (See also *Rio Algom Mines Limited*, [1975] OLRB Rep. Jan. 46, and *Douglas Aircraft of Canada Limited*, [1972] OLRB Rep. Nov. 942.) Under section 95(2), the Board determines only the first question. the second question is a matter for determination by the arbitration procedures specified in the collective agreement, in section 37a of the Act or in section 112a of the Act (if applicable), not by a section 95(2) application. As noted by the Board in *Nelson Crushed Stone*, the first question "usually involves an assessment of whether the person in question 'exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations'". However, in some cases, it involves the more fundamental issue of whether any employment relationship whatsoever exists between the person in question and the employer which is a party to the collective agreement (i.e., "whether a person is an employee, within the general meaning of that term, of a particular employer": see *Hydro-Electric Power Commission of Ontario* (1971), 23 L.A.C. 111, at 112 (Weatherill). The Board has held in several cases that it has jurisdiction to determine that fundamental issue under section 95(2).

12. In *Central Supermarkets Limited*, [1967] OLRB Rep. June 299, the Board was presented with an argument similar to that submitted to the Board in the instant case by the respondent and the intervener, namely, that "while there was no agreement as to the identity of the employer the respondent agreed that the persons in question were *employees* for the purposes of the Act and, therefore, no question could arise within the meaning of section [95(2)]." In rejecting that argument, the Board stated:

"5. The Board is of the view that it is empowered not only to decide whether a person is an employee but whether or not the person is an employee of the employer who is a party to the collective agreement

referred to in section [95(2)] of the Act. It is not the Board's function to determine the question of the employment status of a person in space, because such determination would be impossible. The employment status of a person can only be determined with relation to a specific employer. The admission by the respondent that the persons in question are employees for the purpose of the Act is a meaningless admission unless the identity of the employer is also agreed to.

6. This issue has been previously dealt with by the Board in the *Loblaw Groceries Co. Limited case*, Board File 9845-64-M, in its decision of March 2nd, 1965, wherein the Board stated as follows:

As a preliminary objection to the Board's jurisdiction to entertain this application, counsel for the intervener argues that the issue raised by the applicant is outside the subject-matter of inquiry authorized by section [95(2)] of the Act. He maintains that the inquiry authorized by this section is restricted to the issue of whether a person's particular kind of employment qualifies him as an employee for purposes of the Act. In other words, whether, for example, a person is or is not employed in a managerial capacity or in a confidential capacity in matters relating to labour relations or in any other capacity which, by virtue of section 1(3) (a) or (b) or section 2, disqualifies him as an employee within the meaning of the Act. It is his argument that, apart from any other section, if any, which might be available to the applicant for the determination of the issue raised in this application, section [95 (2)] does not empower the Board, at least where the employment status of the person concerned is admittedly in the sense above indicated that of an employee for purposes of the Act, to inquire into and decide whether such a person is an employee of a particular employer. He contends that the section does not confer any jurisdiction upon this Board to adjudicate upon the real question being raised, which, as he argues, is not whether a person is *an employee* as stated in the section but whether a person, here the respondent company, is an employer. Counsel on behalf of the respondent Loblaw's supports the intervener's position that the section is not applicable to the issues being raised in this case.

The manifest object and purpose of section [95 (2)] is to provide the parties, while they are bargaining for, or during the operation of a collective agreement between them, with an effective and expeditious procedure by which they can obtain a final and conclusive adjudication, binding on all interested persons, of any differences likely to arise between them concerning the question as to whether a person is an employee or a guard. It is self-evident that a very important and obvious question which may arise in such circumstances is, of course, whether a person is an employee of the employer concerned in the bargaining or in the collective agreement or whether such person is an employee of an employer who is not concerned in the matter.

It need hardly be stated that the existence of an employment relationship with the employer for whose employees a union has bargaining rights is basic to any obligation on the part of the employer to bargain under section [14] of the Act. It is equally obvious that unless employees have an employment relationship with the employer who is party to a collective agreement, they cannot, by virtue of section [42] of the Act, be bound by such an agreement. A dispute which involves the question as to whether an employment relationship exists between an employee and the employer concerned or with another employer who is a stranger to the bargaining or collective agreement may well, if it continues unresolved, leave the parties in a difficult stalemate, involving consequences detrimental to good industrial relations. Apart from any other consideration, therefore, we find it difficult to believe that the Legislature was unmindful of this kind of problem arising between the parties when it enacted the section.

....

It cannot be doubted that the first and indispensable prerequisite of an 'employee' for purposes of the Act is an employment relationship with the 'employer' sought to be affected by the particular provision of the Act under consideration. Moreover, no consideration of the meaning of the word 'employee' in section [95 (2)] can be meaningful without reference to the other sections of the Act where the word is clearly used in the sense of indicating the existence of an employment relationship as well as denoting the kind of employment relationship needed to qualify the person as an employee for purposes of the Act (see e.g. section 1(2), 5, 6, 7, 8 and 9). We are, therefore, at a loss to appreciate how the question of whether a person is an employee for purposes of the Act can properly be considered apart from his employment relationship with a particular employer. Employees as such do not exist in space but only by virtue of an employment relationship with their employer.

In our view, it is more consistent with the language of the section and with the sense in which the word 'employee' is used throughout the Act and with the remedial procedure sought to be afforded by the section, to construe the words *whether a person is an employee* in section [95 (2)] as conferring plenary jurisdiction on this Board to inquire into all questions relating to the status of a person as an employee for purposes of the Act including the identity of the employer with whom the person has the employment relationship than to adopt the restrictive, and we think, narrow-gauged interpretation advocated by the intervener and the respondent Loblaws.

In the result, we are impelled to find that the present application and the issues raised therein come within the subject-matter of inquiry authorized by section [95 (2)].

7. While the Board is of opinion that it has jurisdiction to entertain an application under section [95 (2)] in the instant case, its determination of whether or not the persons in question are employees of the respondent for the purpose of the Act does not include a determination of whether or not the persons are employees of the respondent falling within the bargaining unit described in the collective agreement binding upon the applicant and the respondent. We are of opinion that the question of whether or not such persons are employed within the geographic area of the collective agreement is a matter to be determined by a board of arbitration, constituted pursuant to the provisions of the collective agreement.”

Similarly, in the more recent case of *Sunnybrook Hospital*, Board File No. 0874-77-M, dated April 24, 1978, unreported, the Board held that it is within its jurisdiction under section 95(2) of the Act to determine whether certain persons are employees of the respondent employer. That decision reads in part as follows:

“1. This is an application under Section 95(2) of the Act. In its letter of September 23, 1977 the applicant characterized the issue as ‘whether S.H.U.T.C. secretaries are in fact employees of Sunnybrook Hospital or some other organization.’

2. In a decision dated September 30, 1977 the Board ruled that ‘the issue raised by the instant application is one which falls to be determined upon an application of the recognition clause in the subsisting collective agreement between the applicant and respondent and accordingly, it is a matter which must be referred to arbitration under the grievance and arbitration provisions of the subsisting collective agreement.’ The applicant by letter dated October 20, 1977 requested reconsideration of the Board’s decision under Section 95(1) of the Act. In a decision dated January 24, 1978 the Board advised the parties that the matter would be put on for hearing in order to allow all interested parties to make representations.

3. The Board has considered the representations of the parties and is satisfied that its initial decision in this matter was in error. The question as to whether the persons who have been challenged are employees of the respondent, is within the Board’s jurisdiction to determine, under section 95(2) of the Act. (See re *Loblaw Groceterias* case, 66 CLLC para. 16,078, *Central Supermarkets*, [1967] OLRB Rep. June 299.) The Board said in the latter case that:

‘... it is empowered not only to decide whether a person is an employee but whether or not the person is an employee of the employer who is a party to the collective agreement referred to in section 79(2) (now 95(2)) of the Act. ...’”

Accordingly, the Board appointed a Board Officer in the *Sunnybrook* case to “inquire into whether the [persons in question] are employees of [the respondent] and to report to the Board.” (See also *Nick’s Haulage Limited*, [1970] OLRB Rep. Nov. 871 and 873.)

13. The Board's practice of appointing a Board Officer to inquire into matters such as those raised by the present application and then considering the submissions of the parties with respect to the Officer's report, provides an effective and efficient procedure for resolution of such issues. Particularly where, as in the present case, a relatively large number of employees are involved, the Board's procedures may be more expeditious and less expensive than arbitration as a means of obtaining a determination concerning whether or not certain persons are employees of a particular employer who is a party to a collective agreement.

14. The respondent does not dispute that most, if not all of the persons named in this application, other than those who perform clerical functions, are covered by the aforementioned Collective Agreement between the parties if they are employees of the respondent. Thus, the issue in dispute clearly goes beyond the interpretation of their Collective Agreement to the more fundamental issue of whether any employment relationship whatsoever exists between the persons in question and the respondent; indeed, that fundamental issue is not dependent upon the existence of a collective agreement at all. Accordingly, there is nothing which makes arbitration the particularly appropriate forum for resolving that issue. The Board's determination of the employment status of the persons in question will serve a useful purpose for the applicant and the respondent, in that it will resolve most, if not all of the matters in dispute between them. Moreover, if they are unable to resolve any remaining dispute as to whether one or more of those persons is covered by the Collective Agreement in force between them, the Board's section 95(2) finding may be a relevant fact for consideration in arbitral proceedings initiated to resolve such dispute (see *Re Canadian Industries Ltd.*, [1972] 3 O.R. 63 (C.A.), but see also *Re General Concrete of Canada Limited* [1978], 22 O.R. (2d) 65 (Div. Ct.)). Counsel advised the Board that arrangements have already been made with the Labour Relations Officer with respect to a number of dates for the continuation of his inquiry, which dates will be used in the event that the Board rules that he has jurisdiction to proceed. The existence of those scheduled dates is a further factor which makes it desirable for this application to proceed, as it is important from a labour relations perspective that the employment status of the persons in question be determined as expeditiously as possible.

15. It was not suggested by any of the parties that the issue of whether or not the persons in question are employed by the respondent was settled by the current Collective Agreement or by any other form of agreement between the applicant and the respondent, nor was it suggested that the applicant had in any way acquiesced in the position taken by the respondent on March 11, 1981 that the persons in question are not its employees. Thus, the Board is satisfied that this is an appropriate case in which to revise the terms of the Board Officer's appointment to more accurately reflect the issue in dispute between the applicant and the respondent.

16. For the foregoing reasons, the aforementioned endorsement of May 25, 1981 in this matter is hereby revised to read as follows:

"The Board appoints Mr. J. Bowman, Labour Relations Officer, to inquire into and report to the Board on whether the individuals named in the application are employees of the respondent."

17. The matter is referred to the Registrar.

DECISION OF BOARD MEMBERS J. A. RONSON:

The dissent of Board Member J. A. Ronson will issue at a later date.

0526-80-M Ontario Public Service Employees Union, Applicant, v. Niagara College of Applied Arts and Technology, Respondent.

Employee – Reference – Whether reference during term of agreement under *Colleges Collective Bargaining Act* restricted to changes only – Whether first-line supervisors excluded from Act – Whether payroll clerical staff employed in confidential capacity

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members E. J. Brady and B. L. Armstrong.

APPEARANCES: *William A. Lokay, Tom Brooks and Dina D'Amico for the applicant; C. F. Murray, Glenn R. Pevere and Jennie Balasak for the respondent.*

DECISION OF THE BOARD; July 10, 1981

1. This is an application pursuant to section 82 of *The Colleges Collective Bargaining Act, 1975*, in which the parties were unable to come to terms on whether the incumbents of some 17 positions are “employees” within the meaning of the Act. An officer was appointed to inquire into the duties and responsibilities of the various individuals, resulting in a Report of two volumes which the Board has now reviewed. There were also three days of hearings before the Board for the purpose of receiving the oral submissions of the parties. During the course of those hearings the applicant trade union withdrew, from its position, based on its assessment of the evidence, with respect to John Muto, the Planner, Special Projects Office, and Marlene Smith, the Payroll Officer. There remain then 15 positions to be determined by this decision.

2. At the outset of its oral representations, the respondent outlined its position that because the current collective agreement specifies exclusions in Appendix I for 5 of the positions in dispute, the applicant is required to show material *changes* since the date the collective agreement was entered into. This, the respondent submitted, was analagous to the Board’s policy in dealing with applications under section 95(2) of *The Labour Relations Act*. The respondent conceded that it at no time earlier in the proceedings set out in writing the constraints it was now seeking to impose on the applicant, but indicated that it did make clear at the commencement of the Officer’s examinations that it would be relying on Appendix I of the collective agreement. The respondent took the position that in any event, where positions have been accepted as “supervisory” over a long period of time (as here), an onus rests on an applicant to show what has changed. At the very least, the respondent submitted, this history provides the Board with additional evidence, being a long-held consensus of the parties, which it can weigh in deciding whether an individual truly is a “foreman” or “supervisor”.

3. The applicant noted in response that it had received no notice from the respondent that the inquiry should be limited to “changes” only, and had it done so, it would have been prepared to appear before the Board to contest the matter. The applicant points out that the appointment from the Board was for a full examination, and that it accordingly had no reason to direct its mind to the question of changes. The applicant states that it does not wish to rely on changes in the present application, but rather takes the position that it is now entitled to demonstrate that the persons in dispute have been wrongly excluded all along. On the question of Appendix I, the applicant submits that the Board has a duty to determine whether persons in dispute are employees within the meaning of the Act, and that any subsequent issue as to whether persons are in any event excluded by the language of the collective agreement is properly a matter for arbitration.

4. The Board accepts the foregoing submissions of the applicant. The Board notes, in particular, that the appropriate time for seeking to limit the present inquiry to “changes” was at the time of the appointment of the officer. Any dispute over that could then have been determined by the Board (see, for example, *Westmount Hospital*, [1980] OLRB Rep. Oct. 1072), and the Officer’s appointment defined accordingly. The Board notes in addition that its policy, as set out in *Westmount*, is not limited to specific exclusions set out in the collective agreement, but more broadly to whatever may have been the *status quo* at the time of entering into the collective agreement. As noted in *Westmount*, *supra*, the parties are taken, in the absence of an express reservation to the contrary, to have accepted the *status quo* for the life of the agreement. The respondent’s objection, in other words, would apply in this case to all of the classifications in dispute, and is not dependent upon Appendix I of the agreement. Beyond this, the ultimate effect of Appendix I of the collective agreement is properly a matter for private arbitration (see *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500). On the other hand, the Board does find substance in the second branch of the respondent’s argument, being the evidentiary value of the manner in which the classifications have historically been treated by the parties. As the Board noted in *Sudbury and District Hospital*, Board File No. 2005-79-M, March 11, 1981, (unreported) at paragraph 5:

... a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position.

5. A further submission of the respondent concerned the effect to be given the fact that certain of the persons in dispute have been designated by the applicant as “foremen” or “supervisors”. The respondent points to the specific words of Schedule 2 of the Act, and argues that the Board ought not to go behind these titles to assess the status of such persons, unless the Board finds the ratio of supervisors to subordinates to be patently irrational. Schedule 2 provides:

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

- (i) *foremen*,
- (ii) *supervisors*,
- (iii) persons above the rank of *foreman* or *supervisor*,
- (iv) person employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) other persons employed in a managerial or confidential capacity,

...

(emphasis added)

Notwithstanding the specific reference to “foremen” and “supervisors”, the Board is not able to accept the position put forward by the respondent. To do so would render largely illusory the protection provided to the trade union under the Act to have these kinds of disputes resolved, if necessary, by a third party, and would be contrary to the Board’s long-standing policy of looking behind mere job titles in determining issues of this kind. The Board finds that the insertion of the word “other” in subsection (v) of Schedule 2 is fatal to the respondent’s submission, indicating that the persons in subsections (i), (ii), (iii) and (iv) must as well be “employed in a managerial or confidential capacity” (as defined in section 1(1)(1) of the Act). This is the same conclusion which the Board came to in *St. Clair College*, [1980] OLRB Rep. July 1067, at page 1089. Indeed, it is difficult to see how any other conclusion can be reached, in view of the language of section 82 itself, which provides:

If, in the course of bargaining for an agreement or during the period of operation of an agreement, a question arises as to whether a person is an employee, including a question as to whether a person employed as a chairman, department head, director, foreman or supervisor is employed in a managerial or confidential capacity pursuant to clause 1 of section 1 and the schedules, the question may be referred to the Ontario Labour Relations Board and its decision thereon is final and binding for all purposes.

6. As the respondent points out, this application in large measure challenges the exclusion of what have historically been treated as the “first-line supervisors” in this relationship. As *Sudbury and District Hospital*, *supra*, notes, however, where the evidence is equivocal, it is not irrelevant to take into account the status which both parties have accorded to the position over a long period of time, and this factor may be determinative where the evidence otherwise before the Board does not clearly point in one direction or the other. In particular, the treatment of a position by the parties over time as either managerial or the contrary often results in that position developing more and more of the “trappings” normally identified with the status being accorded. Mary Patterson, for example, the Financial Aid Officer, has only one other person under her direction, but has always been agreed to fall on the managerial side of the line, and in consequence has historically been included by management in meetings to discuss its strategy and preparations in the event of a strike, as well as the position of management in negotiations generally. Tony Adams, the Chief Engineer, Media Department, is similarly engaged to a very limited extent of his time in the supervision of others, but has, over time, developed a role and acted in a manner consistent with his managerial status, as exemplified by Exhibit #8 before the Board, a letter of warning issued on his own initiative to an employee in his department. The letter sets out in detail a number of specific complaints which Mr. Adams had with the employee’s work, and states:

During the next month I wish to see marked improvement in the following areas:

• • •

There follows then a lengthy list of items for attention, and the letter closes with the caution that that there must be drastic improvement in the next three months “or I will have no alternative but to recommend disciplinary action”. The letter is signed by Mr. Adams and copied to the Personnel Department. Irrespective of the number of subordinates involved, this kind of

monitoring and initiating responsibility where discipline is concerned is not compatible with inclusion in the bargaining unit, particularly where, as here, the diffusion of such responsibility has a clear historical dimension (compare, e.g., *Simmons Limited*, [1980] OLRB Rep. May 787, paragraph 3). It is now well established that a power of “effective recommendation” is sufficient to establish managerial status where the impact on employees is direct (see, e.g., *McIntyre Porcupine*, [1975] OLRB Rep. April 261; *Inglis Limited*, [1976] OLRB Rep. June 270, at paragraph 9).

7. Another aspect of this historical dimension is that these “first-line supervisors”, and in particular Patterson, Adams and Pat Delavalle, have, on the evidence, been treated as just that in the grievance procedure, representing the first step under the collective agreement. Under this Act, this alone is deemed sufficient ground for exclusion. A “person employed in a managerial or confidential capacity” includes, according to section 1(1)(1), a person who:

• • •

- (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee.

The use of the word “formally” supports the interpretation that the exclusion is granted to those individuals whom *the parties* have established, by the administration of their grievance procedure under the collective agreement, as the member of management designated at one of the stages to receive and reply to grievances. The emphasis does not appear to be upon the location of actual decision-making authority in regard to that reply. This perhaps reflects a recognition that formal replies at any stage of the grievance procedure may be centrally controlled because of their potentially precedent-making effect on the interpretation of the collective agreement. While not all departments have experienced grievances, the history of some of the individuals at this level in formally representing management in the grievance procedure tends to substantiate the evidence of other members of this supervisory group that if a grievance *did* arise, they would be the one required to deal with it as the first step of management. The decision in this case, however, need not rest solely on section 1(1)(iii) of the Act concerning the handling of grievances.

8. Viewing the evidence as a whole, the Board finds that all of these first-line supervisors have historically been granted and have exercised to a greater or lesser degree (as required), the responsibility and authority to monitor the performance of others from a disciplinary (as opposed to purely “technical”) point of view, to control through their recommendations the retention of employees, to grant casual time off and authorize overtime, and to make the determination of whom is to be hired into their department. In terms of the frequency with which this authority is exercised, regard should be had to the comments cited by the Board in *St. Clair College*, [1980] OLRB Rep. July 1067, at paragraph 14:

Clearly, the authority to hire, fire, discipline or promote is central to what we mean by “exercising management functions over other employees”. Yet the complexity of a Board’s evaluation of any position is conveyed by this very example. The decisions to discharge or promote an employee are those where there is the highest potential for a conflict of loyalties from membership in the bargaining unit. The decisions to hire, or even to discipline (especially by way of reprimand) are much

less significant in that regard. Yet from the evidence here, the importance of the actual exercise of that authority to discharge is much less than that of hiring, simply because discharges are so infrequent. The use of the power to discipline or to promote is somewhere in between.

9. Having regard to all of the evidence, the Board finds the following persons to be properly excluded based on its normal criteria for “managerial” status, pursuant to the Board’s discretion under subsection (vi) of section 1(1), and section (v) of Schedule 2, of this Act:

George Rushton	Supervisor of Reprographics
Mary Cunningham	Buyer, Bookstore Supervisor
Pat Delavalle	Supervisor of Shipping & Receiving
Ed Thompson	Building Maintenance Supervisor
Ed Krikorian	Building Operations Supervisor
Al Costello	Plant Operating Engineer
John Coles	Building Superintendent
Mary Petruzella	Admissions Officer
Mary E. Patterson	Student Awards Officer
Helen Sladeschuk	Records and High School Liaison Officer
Tony Adams	Chief Engineer, Media Department

10. The remainder of the persons in dispute perform no supervisory function at all over other employees, and their exclusion is defended on other grounds. Laura Vanclicff is the Programmer Analyst. She is responsible for developing and maintaining programs, as required, for the respondent’s computer systems. Her duties and responsibilities do not appear to differ materially from the Programmer Analyst considered by the Board and found to be an “employee” in *Cambrian College*, [1980] OLRB Rep. Jan. 8. Like that individual, she has the potential for access to various sorts of confidential information, but it cannot be said that the nature of her responsibilities requires her to have a “... regular, material involvement in matters relating to labour relations”, as in *Falconbridge Nickel Mines*, [1966] OLRB Rep. Sept. 379. While both she and the Systems Analyst, John Marshall, have frequent discussions with the Manager of the Department, Tom Honey, these discussions, according to Ms. Vanclicff, are essentially “problem-solving” in nature, from a technical point of view (Report: page 135). It cannot be said from the evidence that these discussions make Ms. Vanclicff or Mr. Marshall either necessarily privy to whatever confidential information Mr. Honey may have, or place them in the position of an “intimate policy sounding board” with “substantial input into and influence on decisions of the employer” (cf. *St. Lawrence College*, Board File No. 1657-77-M, July 11, 1978, (unreported) at paragraph 10). The role of Mr. Marshall, as the Senior Systems Analyst, is to provide input and guidance to management in the selection and improvement of the systems they use to handle and store information, and Mr. Marshall is of course not restricted to the use of computers in this regard. Mr. Marshall fairly points out that his recommendations on a particular system may involve a reduction in the number of employees required, and that indeed that kind of efficiency is a common objective in choosing a system. To date, however, he has been engaged almost exclusively in documenting the existing procedures in use at the College, and it is impossible at this stage to find that Mr. Marshall’s recommendations will have a substantial (i.e. “effective”) impact on actual decision-making, rather than being simply one source of technical information to be weighed by the decision-makers. The Board finds none of the exclusions in the Act to apply to Mr. Marshall or Ms. Vanclicff, and declares them to be “employees” within the meaning of Schedule 2 of the Act.

11. The final persons in dispute are Sharon O'Neil and Judy Elliott, the Payroll Assistant and Payroll Clerk respectively. Their function is to assist the Payroll Officer, Mrs. Smith, in administering the College's payroll. For this purpose, they have access to personnel records as required, but access to the full record is clearly not necessary, and it cannot be said that they have a "regular and material involvement" in such matters of a confidential nature with respect to employee relations. The evidence establishes that Mrs. Smith and the other members of the payroll department are relied upon by the Director of Financial and Administrative Services, Gray La Rose, as his method of performing the calculations necessary to provide budgetary input, or to assess the cost impact of possible staff reductions, and the respondent relies on this fact to distinguish the present payroll group from those included in bargaining units elsewhere. It would appear, however, that such involvement by the payroll staff is neither "regular" nor "material" to their primary duties and responsibilities. The lack of uniformity in their responses as to how much of the budget, for example, they actually see appears to be a reflection of the fact that much of the information is of no interest or consequence to them as far as their own responsibilities are concerned. They are not, in addition, sufficiently privy to the external processes to which the projections relate (be it budgets or staff reduction) to allow them to assess with any clarity the weight to be given one set of projections over another (although it is easy for them to calculate, as one of them did, what their new salary rate would be if a particular projection *were* to be implemented). If any of the three individuals in the department would have that kind of overview, one would expect it to be the supervisor, Mrs. Smith, because of her direct reporting relationship to Mr. La Rose and her participation in management meetings. Yet when the question was put to Mrs. Smith point-blank, whether she would have any knowledge of what the respective positions of the employer and the union are during negotiation, she responded: "Not any more knowledge than is general knowledge around the College". This aspect of the payroll department's work which concerns the respondent appears, in addition, to be reasonably isolated, as opposed to their weekly routine, and the Board must be circumspect in denying collective bargaining on this basis. The requirement for a "regular and material" involvement in matters of confidentiality is an attempt to balance the employer's legitimate need to insulate itself from exposure of, or a conflict in relation to, sensitive information on the one hand, against the danger of too broad an exclusion, through unregimented access to such information, on the other. The Board does not dictate the form which an employer's organization should take, but the mere dissemination of "confidential" information on an occasional and unnecessarily broad basis does not result in an eradication of the bargaining unit.

12. It is important to note that Schedule 2 of this Act contains a specific exclusion for confidentiality in relation to certain budgets. Subsection (iv) reads:

The support staff bargaining unit includes the employees of all boards . . . and nursery staff but does not include,

- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology *including persons employed in clerical, stenographic or secretarial positions.*

(emphasis added)

Persons employed in clerical, stenographic or secretarial positions have always formed a part

of the Board's consideration of the "confidential" exclusion in general, however, and there is nothing in the subsection which suggests to the Board, for the reasons stated above, that the exposure need not be "regular and material" to justify an exclusion. In the present case the exposure is relatively isolated, and particularly with the agreed-upon exclusion of Mrs. Smith, it appears to the Board that the need from time to time from payroll for information or projections which the respondent itself considers unusually sensitive can continue to be met through Mrs. Smith, with minimal dislocation to the respondent's existing practice.

14. There is, finally, no evidence to establish that the members of the payroll department, when given notice of terminations in advance of the effective date in order that the separation papers can be prepared, are given that information ahead of the union or the employee concerned. The Board finds that the Payroll Assistant, Sharon O'Neil, and the Payroll Clerk, Judy Elliott, do not fall within any of the exclusions under the Act, and are "employees" falling in the support staff bargaining unit.

0108-81-R Christian Labour Association of Canada Applicant v. Park Lane Nursing Home Limited Respondent v. Employee Objector

Certification – Employee – Union agreeing to exclusion of nurses as managerial in earlier proceeding – Whether Board entertaining application for nurses

BEFORE: Ian Springate, Vice-Chairman, and Board Members M. J. Fenwick and F. W. Murray.

APPEARANCES: *F. Herrema and H. Beekhuis for the applicant; B. P. Smeenk and L. Freeman for the respondent; no one appeared for the objector.*

DECISION OF THE BOARD; July 23, 1971

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(2) of *The Labour Relations Act*.
3. The applicant initially applied for a bargaining unit which would have encompassed registered and graduate nurses ("R.N.'s") as well as certain "charge" registered nursing assistants ("R.N.A.'s"). At the hearing the applicant dropped its request that the unit include the charge R.N.A.'s., and asked that it be described in terms of R.N.'s below the rank of Director of Nursing. The respondent currently employs two R.N.'s below the rank of Director of Nursing, both of whom are employed as "charge" R.N.'s. At the hearing, the respondent contended that both of these R.N.'s exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act* and hence are not employees for the purposes of the Act. The respondent further contended that the matter of the managerial status of the two R.N.'s had been agreed to in earlier proceedings before a differently constituted panel of the Board involving the same parties.

4. In the earlier certification proceedings (File No. 2657-80-R, filed March 4, 1981) the applicant requested that the bargaining unit be described as follows:

“All employees of the respondent at Paris, Ontario, save and except supervisors, persons above the rank of supervisor, activity director, registered nurses and office staff.”

In its reply the respondent agreed with this unit proposal, except that it requested that students and part-timers be excluded from the unit. At the hearing the parties agreed that the students and part-timers should be placed in a separate bargaining unit, and that the activity director exclusion be deleted. Accordingly, on agreement of the parties the Board described two bargaining units, both of which excluded “supervisors, persons above the rank of supervisor, registered nurses and office staff”.

5. During the earlier certification proceedings the parties discussed the list of bargaining unit employees as filed by the respondent, and agreed to add the name of the head cook to the list. The parties also dealt with the fact that while the names of other R.N.A.’s had been included on the list, the names of the charge R.N.A.’s had not. This discussion ended with the applicant expressly agreeing that the charge R.N.A.’s had been appropriately left off the list of employees in that they came within the “supervisor” exclusion from the bargaining unit. As already indicated the two R.N.’s currently employed by the respondent are employed as charge R.N.’s. It is not disputed that the two charge R.N.’s are above the rank of charge R.N.A.

6. In the proceedings before this panel, the applicant contended that its agreement in the earlier proceedings to exclude charge R.N.A.’s from the two bargaining units was based on a desire to expedite the proceedings and not because the applicant acknowledged them to be persons who exercise managerial functions. In addition, contends the applicant, at the relevant time it had in mind the possibility of later filing a separate application for certification with respect to the R.N.’s and charge R.N.A.’s. It should be noted that the respondent did not contend that there has been a change in the duties and responsibilities of the respondent’s staff since the filing of the earlier application.

7. In our view, the applicant’s agreement in the earlier proceedings to exclude supervisors and persons above that rank from the bargaining units can only reasonably be viewed as an agreement that supervisors are the respondent’s lowest level of management, that is the lowest level of persons who exercise managerial functions, and that accordingly they and everyone above them should be excluded from the bargaining units. The applicant also expressly agreed that charge R.N.A.’s came within the “supervisor” exclusion from the bargaining unit. We are satisfied that in doing so, the applicant implicitly agreed that the charge R.N.A.’s are persons who exercise managerial functions.

8. It is not uncommon for “all employee” bargaining units in nursing homes to exclude non-managerial R.N.’s on the assumption that R.N.’s have a separate community of interest of their own and hence are appropriately included in their own bargaining unit. However, the two R.N.’s currently in the employ of the respondent are employed as charge R.N.’s, which is above the rank of charge R.N.A.’s, and thus were excluded from the original bargaining units not only under the R.N. exclusion, but also as persons above the rank of supervisor, that is, as persons who exercise managerial functions.

9. In that only a few short months ago the applicant agreed to the exclusion of charge R.N.A.'s and persons above that rank (including charge R.N.'s) from the bargaining units under consideration as being persons who exercise managerial functions, and it is not contended that their duties and responsibilities have changed since that time, we are of the view that it is not now open to the applicant in these proceedings to contend that the charge R.N.'s are not managerial.

10. There being no "employees" within the applied for bargaining unit, this application is hereby dismissed.

1422-80-JD Pre-Con Company, A Division of St. Marys Cement Limited, Complainant, v. Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America and Harbridge & Cross Limited, Respondent, v. Labourer's International Union of North America, Ontario Provincial District Council on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 749, 837, 1036, 1059 and 1081, Intervener #1, v. Toronto Construction Association, General Contractors Section, Intervener #2

Construction Industry – Jurisdictional Dispute – Grievance against general contractor alleging violation of subcontracting provision of agreement – General contractor enforcing right against sub-contractor – Subcontractor is employer – General contractor is agent of union demanding work from employer – Board having jurisdiction under section 81 – Relationship between proceedings under sections 81 and 112a considered

BEFORE: D. E. Franks, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *G. Grossman, L. Angelantoni and J. W. O'Riordan for the complainant; Douglas J. Wray, Fred Leach and Tony Grisolia for the Carpenters' District Council of Toronto and Vicinity; S. C. Bernardo and Murray Cross for Harbridge & Cross Limited; B. Fishbein. T. Neil and P. Hitchen for intervener #1; S. C. Bernardo and Brian Foote for intervener #2.*

DECISION OF THE BOARD; July 8, 1981

1. This is a complaint made under section 81 of *The Labour Relations Act*. It arises as a result of a previous decision of another panel of this Board in a case between the respondent, The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as the "Carpenters Union"), and the respondent, Harbridge and Cross Limited in Board File No. 1321-80-M unreported. That case was a referral of a grievance under section 112a of the Act. The panel of the Board adjourned the referral pending

a determination of a section 81 complaint dealing with the issue raised in the section 112a referral. As a consequence of that adjournment the instant complaint was filed. The matter came up for hearing and at the hearing the respondent, Carpenters Union, in the present application challenged the jurisdiction of this Board under section 81.

2. Before dealing with the evidence and the argument of the various parties as to whether there is a complaint under section 81, it is necessary to set out some general background concerning the present dispute. The job site in question is a construction project for Metal Improvements Company located in the Cabado Court in the City of Brampton. On that job, Harbridge and Cross Limited is the general contractor. In the course of the construction of the project, Harbridge and Cross let a contract for the supply and installation of a product known as flexwall to the complainant Pre-Con Company. There are several points to note in the contractual arrangements between Harbridge and Cross and Pre-Con. First, that the contract was for the complete installation of flexwall, which included amongst other things the caulking of joints between the precast panels. Secondly, the contract contained a labour compatibility clause, i.e. a clause in which Pre-Con undertakes to use compatible labour forces with those on the job site. Further, it also contains a "save Harmless" clause whereby Pre-Con undertakes to save harmless Harbridge and Cross in the event that Pre-Con, in the performance of its contract, damages the interests of Harbridge and Cross.

3. Harbridge and Cross as a general contractor is bound by the provincial agreements for Carpenters and for Labourers contemplated by sections 125 to 136 of *The Labour Relations Act*. The Pre-Con Company is also bound by a provincial agreement, namely, the provincial agreement covering the installation of precast concrete for which the Labourers International Union of North America and the Provincial Council is the designated employee bargaining agency and the Ontario Precast Manufacturers Association is the designated employer bargaining agency. Also part of this background is the fact that the Carpenters Union has no collective bargaining relationship with Pre-Con.

4. Although the issue of the extent of the work in dispute was not settled at the hearing in this matter, the Carpenters in their previous grievance were claiming damages from Harbridge and Cross for a violation of a subcontracting clause in the provincial agreement with respect to caulking work. The complainant in the present case lists the work in dispute as virtually all work in relation to the installation of precast concrete components. It is clear on the evidence which the Board heard, that the concern of the Carpenters Union which gives rise to this matter is solely in relation to caulking of the various components. At the hearing, counsel agreed to limit the present issue to whether or not the Board has jurisdiction to entertain this complaint under section 81. Counsel for the complainant, counsel for Harbridge and Cross, and counsel for the Labourers Union took the position that the Board has the jurisdiction to entertain this complaint. It was only counsel for the respondent, Carpenters Union, which took the position that the Board did not have jurisdiction to entertain the complaint.

5. The respondent, Carpenters Union, have thus raised a number of objections to the jurisdiction of the Board to entertain a complaint under section 81(1). Since this matter was referred to the Board under section 112a and that referral has deferred to this section 81 — the present preliminary matter calls into issue the relationship between the section 112a grievance and the jurisdiction of the Board under section 81(1).

6. As indicated above, Harbridge and Cross is the general contractor of the job site in question. By a standard form of construction contract between a contractor and a sub-contractor dated February 14, 1980, Harbridge and Cross sub-contracted to Pre-Con Company the complete work of precast concrete wall panels in accordance with certain contract documents. That contract contains in Appendix A the following two paragraphs:

“Sub-Contractor agrees to hold the said Contractor harmless from and against any and all claims, losses, demands, suits or actions, etc. which now or may hereafter be brought against the said Contractor arising directly or indirectly out of or from the operations performed by or on behalf of the Sub-Contractor.

Sub-Contractor certifies that he has an appropriate agreement with the local trade union and will cause no disharmony on the job with the tradesmen used.”

7. The actual work on the sub-contract started the last week in August, the week before Labour Day. Apparently the contract took only two weeks to perform the erection of the precast concrete.

8. On about August 27th the business agent for the Carpenters Union, Mr. Grisolia, checked the job site. It appears that he had discussions with a superintendent for Harbridge and Cross and asked who was doing the caulking on the precast panels. He was informed that Pre-Con had the contract to do the work, however, the superintendent didn't know who was actually performing the work that is whether it was Pre-Con itself or a sub of Pre-Con. Grisolia and Basso spoke on the phone on either the 28th or 29th of August. At this point there is some discrepancy in the evidence of Basso and Grisolia. It appears that Dominion Caulking was the subject of discussion. Grisolia apparently asked Basso if Dominion Caulking bid on the caulking work. He was told that they had, but that the bid was not accepted because the price was too high. However, it is common to both accounts of the conversation that Grisolia wanted Basso to have Dominion Caulking do the job. What is in conflict in their evidence is that Grisolia denies asking Basso to have Pre-Con hire carpenters to do the work. Grisolia denies having asked Basso to hire Carpenters. On the other hand, Basso was quite clear in his evidence that Grisolia wanted Basso to hire carpenters if the work was not to be let to Dominion Caulking.

9. As a consequence of this discussion, Basso filed a grievance against Harbridge and Cross which is dated August, 29, 1980, alleging that the grievance arose on August 27, 1980, and the nature of the grievance is as follows:

“Carpentry work sub-contracted to a company not in contractual agreement with this Council. Caulking on precast cement. Job site at Cabado Court.”

10. As a consequence of the grievance being filed against Harbridge and Cross by the Carpenters, a meeting was arranged for September 9th under the auspices of the General Contractors Section of the Toronto Construction Association. Present at that meeting were Mr. Edward Burrows of the General Contractors Section of the TCA, Mr. Grisolia and Mr. Leach of the Carpenters Union and Mr. Cross of Harbridge and Cross. It appears that a Mr.

Hitchen of the Labourers Union attended at the TCA offices wanting to participate in the meeting. However, Messrs. Leach and Grisolia refused to meet with him. At that meeting it appears that Mr. Leach took the position that the Carpenters had recently lost a lot of caulking work, and they considered it part of their jurisdiction and they wanted it back. Mr. Cross took the position that he had simply let a package in the normal commercial way, and that caulking was part of that package. Mr. Leach also said that he was going to put pressure on Pre-Con to regain lost work.

11. Subsequent to the meeting at the TCA offices, a grievance was referred to the Board on September 13th. As a consequence of the grievance proceedings, the following letter was sent by Harbridge and Cross to Pre-Con:

“With reference to our contract with yourselves we would remind you of our requirement that the labour employed by Pre-Con on the jobsite at M.I.C. on Cabado Court in Bramalea must comply with our collective agreements.

Because of a grievance lodged by the Carpenters’ District Council, under the terms of our agreement with the Carpenters we are hereby required to direct you to employ carpenters on caulking associated with precast installation on the M.I.C., Cabado Court jobsite.”

12. The grievance referred to the Board became Board File No. 1321-80-M between the Caprenters Union as the applicant and Harbridge and Cross as the respondent, with three interveners. By a decision dated October 21, 1980, a different panel of the Board deferred to an application under section 81 of the Act, which resulted in the present complaint.

13. There remains one further fact to be dealt with. As noted above, Harbridge and Cross, the general contractor, is a party to the provincial agreement with the Labourers International Union of North America. That collective agreement contains a specific schedule relating to Local 506 in Toronto and contains as Article 10:01 the following terms:

“The terms and conditions of the Collective Agreement between the Local and various contractors shall apply to post-tensioning, pre-stressing, diamond concrete saw cutting, cutting, corning and drilling and the erection and finishing of precast concrete products.”

14. The evidence of Brian Foote was that this provision had been part of a provincial agreement concerning Labourers, negotiated in 1978 and in 1980, and that it was a consequence of a demand by the union that any contractor bound by the Labourers provincial agreement would utilize the special agreements referred to in that clause. The reference to precast concrete products, in turn being a reference to the provincial agreement for precast labourers, negotiated by the Ontario Precast Concrete Manufacturers Association, and the designated bargaining agency of the Labourers Union.

15. Before dealing in detail with the evidence heard by the Board we would now like to set out the arguments by which counsel for the respondent, Carpenters Union, claims that there is no jurisdiction under section 81 for the Board to entertain this complaint:

“(a) The Carpenters grievance against Harbridge and Cross is for a

violation of a collective agreement and Harbridge and Cross is not the employer under section 81(1). It is Pre-Con that is the employer and the Carpenters grievance is not against Pre-Con,

(b) There is no evidence that the Carpenters were requiring Pre-Con to assign work to members of the Carpenters Union,

(c) Harbridge and Cross cannot be said to have acted as an agent for the Carpenters in its dealings with Pre-Con.”

16. Turning to the Carpenters first argument that it is Pre-Con that is the employer in the present case and that their grievance was originally against Harbridge and Cross, thus, Pre-Con is not “the employer referred to in section 81”. While it may be that the grievance was filed against Harbridge and Cross, it is clear on the evidence that Harbridge and Cross in turn is bound by two collective agreements, (that relating to Carpenters and that relating to Labourers), and that these collective agreements have binding subcontracting clauses. Further, the Labourers collective agreement in the Toronto area has a referral to the precast provincial collective agreement. On their face then it appears that Harbridge and Cross was thus bound by two conflicting provincial collective agreements, in that both agreements require Harbridge and Cross to subcontract, for instance, caulking of precast panels in a certain way. In its subcontract to Pre-Con, Harbridge and Cross specifically protected itself in the manner set out in paragraph 7 above, and as indicated in paragraph 12 Harbridge and Cross has emphasized its contractual right vis-a-vis Pre-Con. This in turn puts Pre-Con into a precarious position. Pre-Con has assigned the work in question in accordance with its collective agreement. It has been put on notice by Harbridge and Cross that it may be in violation of its subcontract terms, particularly in relation to the liability of Harbridge and Cross in the section 112a grievance filed by the Carpenters. It is in that capacity that Pre-Con is the employer making the assignment under section 81(1). This is sufficient to distinguish the present case from the *Napev* case [1980] OLRB Rep. Feb. 247, where there was no evidence that Napev the general contractor had attempted to enforce any rights against Venice Masonry, the actual employer in that complaint. In that case the Board held that a complaint did not lie against Napev under section 81(1). Here, however, we have the actual subcontractor bringing the complaint and further in the face of a claim for indemnity by Harbridge and Cross against Pre-Con.

17. We turn now to the second and third arguments made by the Carpenters which is that the Carpenters are not directly requiring Pre-Con to assign work to the members of the Carpenters Union, nor are they indirectly through Harbridge and Cross as their agent, requiring Pre-Con to assign the work to members of the Carpenters Union. While there may have been evidence that the Carpenters were directly requiring Pre-Con to assign work to members of the Carpenters Union through the conduct of Mr. Grisolia, it is not necessary for us to make a finding in this regard. We are clearly of the view that the Carpenters through their grievance against Harbridge and Cross intended to put “pressure” on Pre-Con to assign such work to Carpenters. Clearly, in filing the grievance against Harbridge and Cross, the Carpenters are seeking the assignment of certain work, and it is naive to suggest that Harbridge and Cross would sit idly by and not transfer this request to Pre-Con. Harbridge and Cross’ transference of this request to Pre-Con through its letter referred to in paragraph 11 above, was applying precisely the kind of “pressure” that the Carpenters wanted applied on Pre-Con. In that sense, Harbridge and Cross is acting as the “agent” making a requirement on

the Carpenters behalf, directly to Pre-Con. This is precisely the manner in which Pigott Construction acted as the agent for the Ironworkers in the *Beer Precast* case, (*Regina v. Ontario Labour Relations Board, Ex parte International Association of Bridge, structural & Ornamental Iron Workers, Local 736* [1969] 1 O.R. 405), in which the Ontario Supreme Court found that Pigott acted as agent for the Ironworkers within the meaning of section 81 of the Act.

18. For the foregoing reasons we are prepared to find, on the facts, that the Carpenters Union have through their grievance against Harbridge and Cross required the complainant, Pre-Con, to assign work to the Carpenters Union, and thus, the Board has jurisdiction to entertain this complaint within the meaning of section 81(1) of the Act.

19. As noted earlier, this case raises certain difficult matters in the arbitration of grievances under section 112a of the Act, where such cases involve a jurisdictional dispute. Clearly, not all violations of a subcontracting provision in a collective agreement give rise to jurisdictional disputes, and indeed, to defer to section 81 complaints in section 112a proceedings in every case where a subcontracting clause is raised as the subject matter of the grievance would result in the denial of the intended expedition set out in section 112a. On the other hand, the Board administers both section 112a and section 81 and as a matter of fairness will not proceed with an arbitration under section 112a where the matter in dispute is clearly a jurisdictional dispute. To do otherwise would be a finding of protecting the jurisdictional claim of one union in the absence of the other competing trade union. On the other hand, a section 81 complaint only lies when certain conditions have been met, and unless those conditions are met, it is clear from both Board and Court jurisprudence that the Board cannot entertain the complaint.

20. Of particular concern in the present dispute is the matter of conflicting provincial collective agreements binding upon a general contractor. We are of the view that where the contractor is bound by such completely conflicting collective agreements, and an attempt is made to enforce those agreements, that that is *prima facie* a jurisdictional dispute. This is particularly so in the present case where the general contractor bound by such conflicting provincial agreements puts pressure on the subcontractor actually employing the men. We are prepared to view that as "requiring" the subcontractor within the meaning of section 81(1). Not only are we satisfied that the Board has the jurisdiction to entertain such complaints under section 81, but such a procedure affords all of the affected parties an opportunity to protect their interests, and section 81 gives the Board the broad powers to develop an appropriate labour relations remedy. In the circumstances the Registrar is directed to list this matter for continuation of hearing.

0570-80-R; 0686-80-U United Food and Commercial Workers International Union, AFL-CIO-CLC, Applicant, v. **Primo Importing and Distributing Co. Ltd.**, Respondent, v. Group of Employees, Objectors.

Certification – Membership Evidence – Section 7a – Membership evidence over one year old – Subsequent acts confirming membership – Affecting Board’s discretion to direct vote – Employer’s foremen aware of petition – Whether violation of Act – Whether foremen conduct justifying section 7a certificate

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members C.A. Ballentine and F. W. Murray.

APPEARANCES: *James Hayes and Vince Gentile for the applicant/complainant; R. Parry, A. Pelliccione and A. Capozzi for the respondent; M.G. Horan and O. Bizzotto for the objectors.*

DECISION OF THE BOARD;

I

1. This is an application for certification which was heard together with an unfair labour practice complaint filed under section 79.

2. The Board is satisfied and finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. Having regard to the agreement of the parties the Board finds that all employees of the respondent in Metropolitan Toronto save and except forepersons, and those above the rank of foreperson, office and clerical staff, sales staff, and students employed during the school vacation, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. In support of this application for certification the Union filed documentary evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit found by the Board to be appropriate. There was also filed with the Board a petition signed by a number of employees, indicating that they did not wish to be represented by the Union. This petition contains the names of some employees who had previously indicated their support for the Union by signing membership cards. These employees had had a purported change of heart, and, it was argued, now no longer support the Union’s certification. Both forms of evidence were subject to attack. The Union’s membership evidence was assailed on the ground that some of it was “stale” (i.e. signed more than a year prior to the application date), defective in form, and not clearly referable to the applicant. The petition was attacked on the ground that it had been inspired by management, and did not represent the voluntary wishes of those who signed it. The petition was characterized as but one part of a pattern of unfair labour practices so serious and pervasive that, regardless of any defect in the Union’s membership evidence, the Board should exercise its discretion to grant certification pursuant to section 7a of *The Labour Relations Act*.

5. The Union's documentary evidence of membership consists, in part, of membership cards. Each card is a combination application for, and acceptance of, membership in the Union, together with an attached receipt indicating that at least one dollar has been paid in respect of union dues. Both the receipt portion and the membership portion of these cards is signed by the employee, and each card is countersigned by the individual who solicited his or her support. The documentary evidence of membership is supported by a properly-completed Form 8 statutory declaration attesting to its regularity and sufficiency. Save in one instance, there is no allegation of impropriety in the solicitation of these membership cards, and there is no evidence that they do not represent the voluntary wishes of the employees as at the time they were signed.

6. There is no problem with the membership cards signed in the name of the applicant immediately prior to the certification application, and we shall say no more about them. The difficulty lies with certain membership cards signed *prior to June 1979* bearing the name "Amalgamated Meat Cutters and Butcher Workmen of North America" ("The Amalgamated" – one of the two unions (the other being the Retail Clerks International Union) which in June, 1979, merged to form the applicant. Some of these "Amalgamated cards" are very old indeed, dating back to 1978; however, each such card is supported by a recent confirmation, which is also signed by the subject employee, countersigned by a witness, and reads as follows:

"Confirmation of Union membership in The Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIL-CLC (now known as United Food and Commercial Workers International Union AFL-CIO-CLC).

"This will confirm that I hereby reaffirm my union membership in the above-noted union which I joined on _____ and paid the \$1.00 initiation fee and authorize the United Food and Commercial Workers International Union, AFL-CIO-CLC, its agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, and to enter into contracts with my employer covering all such matters."

Date: _____

Witness: _____

Signature

Address

There is no new monetary payment or financial commitment to the trade union. The confirmation form merely reaffirms that such payment was made at some time in the past.

7. The reaffirmations mention the name of both the applicant and its predecessor, and, when read, together with the original "Amalgamated cards" link the two organizations together and represent a recent expression of employee desire to be represented by the merged

entity. There is no allegation that the recent confirmations do not reflect the facts, or the voluntary wishes of those who signed them; nor has any employee come forward to allege confusion on his part as to what he was signing, or whom he was supporting. In summary the, the union's membership evidence consists, in part, of "old cards" and "old money" which is "updated" by a recent confirmation linking The Amalgamated with the United Food and Commercial Workers International Union ("UFCWIU"), and affirming support for the latter. It is this evidence which the applicant argues is sufficient to meet the requirements for membership contained in section 1(1)(j) of the Act and referred to in section 7(2). The applicant further argues that the Board should not exercise its discretion to order a representation vote simply because the form of the documentary evidence is somewhat unusual.

8. Vince Gentile, a representative of both the applicant and The Amalgamated prior to the merger, told the Board, about his continuing efforts to organize the respondent's employees, and the reasons why the membership evidence takes its present form. This evidence was uncontradicted.

9. The respondent runs a large food processing operation in Toronto, and The Amalgamated has been trying to organize its employees for some years. The union met with some success in 1978 and 1979, but Gentile did not consider the trade union's support sufficient to warrant a certification application at that time. Accordingly, the cards and money which had been collected, were segregated and preserved pending further organizing attempts. These occurred sporadically throughout 1978 and 1979. A growing interest among employees in the spring of 1980 prompted a wave of new union supporters and eventually led to the present application. Rather than "resigning" old union supporters to cards in the name of the merged organization, and collecting a new payment in respect of membership fees, Gentile concluded that it would be sufficient to have such supporters reaffirm their continued desire for union representation. Consequently, new adherents were signed to new cards and a one dollar payment was collected, but old supporters were only asked to sign a reaffirmation of support in the form set out above.

10. Throughout the long period of the organizing campaign most of the union's new supporters had no active participation in its affairs. They did not attend union meetings, vote in union elections, participate in general union business, pay regular monthly dues, or perform any other act consistent with membership. Gentile explained that it was the union's practice not to collect any monthly dues until the union was formally certified to represent the employees, and prior to such certification there was no real need for membership meetings other than those conducted by key union supporters in respect of the organizing campaign itself.

11. In June 1979 The Amalgamated and the "Retail Clerks" merged to form the applicant UFCWIU. The UFCWIU established its status as a trade union in *Research Foods Limited* Board file 0993-79-R; and there is really no dispute that all three organizations are or were trade unions within the meaning of section 1(1)(n) of *The Labour Relations Act*. There was no attack made on the constitutional propriety of the merger, and we are satisfied that as a result thereof the UFCWIU has acquired all the rights, privileges, duties and obligations of its predecessor organizations (see section 54 of the Act which permits the Board to so declare if any question arises concerning its right to act as successor and stand in the shoes of its predecessor with respect to established bargaining relationships). This is the thrust of the merger agreement itself which provides in part:

"All members of the Retail Clerks and the Amalgamated will be members of the Merged Organization upon the effective date of the merger. Furthermore, wherever a condition of the enjoyment of any right or privilege is based on length of membership in the Merged Organization, previous membership in the Retail Clerks or the Amalgamated will be deemed the equivalent of membership in the Merged Organization. Members of the Constituent Unions will be deemed to be members of the Merged Organization without payment of any membership or any other membership fee except any which may be due and unpaid to either of the Constituent Unions.

. . . .

"The Merged Organization shall be deemed, for all purposes, to be a combination and continuation of the Retail Clerks and the Amalgamated. Neither of such organizations shall be deemed, for any purpose, to be dissolved, terminated, or discontinued, but upon the effective date of the merger the Constituent Unions shall be merged and continued as a single organization, governed by this Merger Agreement and the Constitution of the Merged Organization, which Constitution shall be an amendment to and substitute for the present separate constitutions of the Retail Clerks and the Amalgamated.

. . . .

"The merger of the Retail Clerks and the Amalgamated shall not affect, interrupt, or change in any way the continuing status, or the rights or duties with respect to third persons, of either the Retail Clerks or the Amalgamated or any organization chartered by the Retail Clerks or the Amalgamated, and, further, shall not impair the status of such organizations in any pending action or proceedings, or any right, title, or interest in any property, or arising from any deeds, bonds, mortgages, leases, or contracts of any kind including but not limited to recognition agreements and collective bargaining agreements or the continuity thereof and further, shall not impair any federal, state, provincial, territorial, or commonwealth certification or any representational rights or any other rights or obligations of such organizations under their existing collective bargaining agreements or checkoff authorizations. All authority, power, and rights, jurisdictional and otherwise, held by or vested in the Retail Clerks and/or the Amalgamated under or in connection with any charter or affiliation with the AFL-CIO and CLC shall automatically be vested in the Merged Organization."

The merger agreement links the two predecessor unions together and members of each are deemed to be members of the merged organization — the applicant.

12. The first question which must be determined is whether the individuals who signed Amalgamated cards and paid one dollar to that organization, then subsequently signed confirmations of membership in the Amalgamated (as it has now become) together with a

statement that they wished to be represented by the UFCWIU, can be considered “members” of the latter organization for the purposes of section 7 of the Act. One might begin with section 1(1)(j) of the Act which reads:

“member”, when used with reference to a trade union, includes a person who,

- (i) has applied for membership in the trade union, and
- (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and “membership” as a corresponding meaning;

13. Section 1(1)(j) of the Act, does not impose any absolute requirements that there be a written application for membership or a one dollar payment. The use of the term “includes” contemplates the possibility of other forms of membership evidence — although it might be noted that by virtue of rule 48 and section 100, that evidence must necessarily be in writing. However, except in the construction industry, evidence of trade union membership almost always takes the form of combination applications and attached receipts designed to conform to the section 1(1)(j) definition. This form of evidence is recognized by Form 8, and has been considered sufficient to demonstrate union membership since at least 1950 (prior to 1950 the Act embodied the notion of “membership in good standing” rather than simply “membership”). Indeed the Board has been reluctant to accept anything else. (See section 92(2)(j) which together with sections 95 and 97 give the Board exclusive jurisdiction to prescribe the form of membership evidence; and see also section 91(12) which empowers the Board to prescribe its own practice and procedure.)

14. Section 1(1)(j) was enacted immediately after the decision of the Supreme Court of Canada in *Metropolitan Life Insurance Company* (1970) 11 D.L.R. (3d) 336. In that case the Court ruled that by not assessing the membership status of employees according to all of the terms of the union’s constitution and looking only to whether the employees had made an application for membership and paid not less than one dollar as an initiation fee, the Board was “asking itself the wrong question”. The decision of the Court effectively struck down the Board’s longstanding practice and a legislative amendment followed within weeks of its release reaffirming the *status quo ante*. Now, if the section 1(1)(j) standard is met an individual is deemed to be a “member” for the purposes of the Act regardless of the other ways in which membership might be established.

15. There is really no doubt in the present case that the persons who signed cards in The Amalgamated and made a monetary payment to it, thereby became members within the meaning of section 1(1)(j). Nor can this evidence be considered “stale”, because it is supported by a recent written reaffirmation of the contents of the earlier card linking the applicant with the predecessor organization and confirming a continued desire to be represented by the organization of which The Amalgamated is now a part. The Board has always treated membership evidence in a local union (a constituent union of a larger national organization) to be membership in the parent, and we see no reason why membership in a constituent part of a merged organization should not be treated as membership in the larger entity — particularly where, as here, the constitution of the UFCWIU deems these individuals to be “members” of the very organization by which they now indicate they wish to be represented. In the

circumstances, it would fly in the face of the evidence to hold that these persons were not “members” of the applicant for the purposes of section of 7(2) of the Act.

16. But the membership issue is not the only one which must be determined. The Act gives the Board the discretion to seek the confirmatory evidence of a representation vote *despite* the fact that more than fifty-five per cent of the employees in the bargaining unit are “members” of the applicant union. Membership support demonstrated by documentary evidence *may* be the basis for outright certification, but the Board has a discretion to conduct a vote to determine whether the union’s “members” continue to support its certification as their bargaining agent. This discretion is unfettered by any statutory guidelines, and gives the Board the authority to order a representation vote wherever it appears to be warranted in the circumstances of a particular case. Such circumstances might include: irregularities in the manner in which the evidence was solicited (see for example, *Alex Henry* [1977] OLRB Rep. May 288; *Wilcolater Canada Ltd.*, 59 CLLC ¶18,146; or *Carelton University* [1975] OLRB Rep. March 308); evidence that a substantial build-up of the workforce is anticipated so that the present employee compliment is grossly unrepresentative; the filing of a voluntary statement indicating that members who originally supported the union no longer wish to do so; or irregularities in the form of the union’s membership evidence. In all of these instances the Board may seek the confirmatory evidence of a representation vote rather than relying solely on the union’s membership evidence.

17. The respondent and the intervenors submitted that the Board should dismiss the application outright because a portion of the Union’s documentary evidence includes cards more than a year old. We cannot accept that contention. As we have already noted, these “stale” cards are supported by a recent written confirmation of continued interest in representation by the applicant, and thus do not fall directly within the rationale supporting the state evidence “rule” enunciated by the Board in a number of cases.

18. The applicant contended that its UFCWIU cards were beyond dispute, and the recent confirmations not only substantiate the employees’ membership in and continued support of the union, but also make it unnecessary for the Board to order a representation vote. The applicant argued that having once made a financial payment to the union, no new financial payment was necessary; and drew the Board’s attention to a number of cases which it argued support that position.

19. In *Ben Bruinsma* [1963] OLRB Rep. July 223, the Board had before it an application for certification supported by combination applications and receipts which were more than one year old. The Board dismissed the application and enunciated the following statement of policy:

“It is clear that all but two of the cards and receipts are more than a year old. There is no documentary evidence before the Board indicating that the employees have made any further payments or done any act which could be taken as confirmatory evidence of their desires with respect to membership in the applicant. (Such confirmatory evidence if less than a year but more than six months old, may be considered by the Board as sufficient to warrant the ordering of a representation vote. If the evidence is not more than six months old, it is normally considered sufficient to warrant outright certification.) The time within which documentary

evidence may be filed under the provisions of *The Labour Relations Act* and the Board's Rules of Procedure has now passed."

20. This statement of policy, of course, was made prior to the statutory definition of membership contained in section 1(1)(j); but the general approach has been followed in a number of cases. The difficulty with many of these cases is that, like *Bruinsma* they were decided prior to section 1(1)(j), or arose in the construction industry, and thus did not involve membership cards similar in form to those present in this case. In the construction industry craft unions still predominate, and tradesmen maintain their membership in such unions as they move from job to job or company to company. In the construction industry the Board has accepted as valid evidence of membership, certificates of membership signed by the employee and a responsible officer of the union and demonstrating payment of the union's ordinary dues. Even in the construction industry, however a variant of the *Bruinsma* principle has been applied. In *Kawneer Installations* [1971] OLRB Rep. Oct. 674 membership certificates submitted by the union were more than one year old and there was no satisfactory evidence of a further payment or other act confirming continued support. The union's evidence was disregarded entirely. In *Highland Construction* [1961] OLRB Rep. Nov. 266 combination applications similar to those in the present case were disregarded entirely because they were more than one year old and unsupported by any new monetary payment within a year preceding the application date. In *W.N. Construction (Ottawa) Limited* [1968] OLRB Rep. Sept. 645, the union was certified, but evidence unsupported by a monetary payment within the previous six months was not considered on the ground that such evidence would only support a representation vote (i.e. the Board would exercise its discretion to hold such vote to confirm the documentary evidence). In *Charterways Transportation Limited* Board file 1155-79-R (unreported) the Board ordered a representation vote because, although more than fifty-five per cent of the employees were "members" of the applicant within the meaning of section 1(1)(j) of the Act, the last monetary payment was more than six months but less than a year prior to the application date. In *Howard S. Clark* [1967] OLRB Rep. Sept. 553, the Board found that, in the absence of some confirmatory act of membership, a combination application/receipt more than a year old should be disregarded and a card just over six months old should be supported by the confirmatory evidence of a representation vote. Echoing the words of *Bruinsma* the Board remarked:

"In support of its application for certification the applicant filed two combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of at least \$1.00 has been made. One of the combination applications is dated July 18th, 1967 and the other October 23rd, 1966. With respect to the latter combination application there is no documentary evidence before the Board indicating that the employee on whose behalf the application was submitted has made any further payments or done any act which could be taken as confirmatory evidence of his desires with respect to membership in the applicant.

"When evidence of membership is not more than six months old, calculated from the date of application, it is normally considered sufficient to warrant outright certification. If, however, the evidence of membership is less than a year but more than six months old, it is only

considered by the Board to be sufficient to warrant the directing of a representation vote (see *Bruinsma and Sons Limited Case*, O.L.R.B. Monthly Report, July 1963, p. 223). This is the situation that exists with respect to the evidence of membership dated October 23rd, 1966 submitted by the applicant on behalf of one of the two persons included in the bargaining unit."

In *Victoria Shipping Services Limited* [1966] OLRB Rep. June 252, on the other hand, cards more than one year old but supported by a recent monetary payment were considered sufficient to support outright certification.

21. In the present case, although there has been an application for membership, a payment of one dollar, and a recent confirmation of membership support for the applicant, there has in some cases been no financial commitment to the applicant for more than two years, and the narrow issue before the Board is whether we should exercise our discretion and seek the confirmatory evidence of a representation vote. To put the issue another way: is a simple written statement of continued interest in the union sufficient confirmation of support to warrant outright certification, in the absence of any active involvement in the union's affairs between the time the card was signed and the making of the application? Or is some more significant commitment required? The importance of such commitment was discussed by the Board in *Leons Furniture Limited* [1976] OLRB Rep. Feb. 8 at page 9:

"This notion of financial sacrifice seems to have been discussed first in *RCA Victor Ltd.*, 53 CLLC ¶17,067 (OLRB) wherein it was expressed that a money payment was necessary to constitute confirmatory evidence of the desire of the payer to become a member of the trade union. In other words, the Board was saying that it wants to be assured that the employees who are alleged to have become members have directed their minds and given careful thought to the implications of such a step. Moreover, the Board has time and time again emphasized that it must exact and protect stringent standards with respect to membership evidence in that other parties to a certification proceeding do not have the opportunity to examine the membership evidence nor in the usual case do parties have the opportunity to cross-examine the witnesses with respect to membership evidence. (See *Zehr's Markets Ltd.*, [1972] OLRB Rep. June 635.)

"These requirements of the Board are clear and well known and we are loathe to deviate from them. Despite the apparent arbitrary nature of such rules they fulfill three important functions — cautionary, evidentiary, and channelling.

"The *RCA Victor* case outlines the cautionary nature of the requirement and *Zehr's Markets Ltd.* is representative of the evidentiary perspective. The third function — that of telling employees and trade unions how membership in a trade union can be obtained for the purposes of the Act — is important to both the Board and the parties. Clear and unequivocal rules in this important area provide the kind of predictability and

certainty that is required for organizational purposes and minimizes the amount of “litigation” before the Board. Thus the certification process is expedited and the secrecy as to union membership provided under section 100 is accomplished. In other words, the more the Board deviates from its accepted practice the more parties will be encouraged to litigate the question of membership evidence with all the attendant costs of such disputes.”

The substantive nature of the monetary payment was further confirmed in *P.R.C. Chemical Corp. of Canada Ltd.* [1980] OLRB Rep. May 749 and *Cooper-Weeks Ltd.* [1969] OLRB Rep. Nov. 974.

22. The trade-union status cases relied upon by the applicant provide only an imperfect analogy with the present case. The leading such case is *M. Loeb Ltd.* [1962] OLRB Rep. May 69, where the question was whether membership cards signed prior to the formal existence of a trade union could be rectified by some subsequent act of the employee or trade union. The Board commented:

“Where evidence of membership in a trade union submitted in support of an application for certification consists of application cards, signed, and payment of initiation fees, prior to the time that the applicant came into existence as an organization, the Board does not regard such evidence as valid evidence of membership in the absence of other evidence that the alleged members did some other act consistent with membership after the applicant was formed, or in the absence of some motion by the applicant rectifying the membership of persons who applied for membership prior to the applicant being formed.”

In *Spring Plastering Ltd.* [1968] OLRB Rep. Jan. 997, the Board enumerated some of the acts which might confirm membership in the trade union including: voting for the election of officers, ratifying a constitution, or payment of dues. But here, the issue is not the reaffirmation of membership per se. We have found that the Amalgamated cards supported by a recent reaffirmation are sufficient to support a finding that the signatories are “members” of the applicant. The question is whether, with only a simple written statement of membership, unaccompanied by a recent monetary payment or any other tangible act consistent with trade union support, the Board should seek the confirmatory evidence of a representation vote, before certifying the applicant as the employees’ bargaining agent.

23. The applicant relies heavily upon *Firestone Tire and Rubber Co. Canada Ltd.* 52 CLLC ¶ 1385 — a case decided before *Bruinsma*, before, *Metropolitan Life*, and before section 1(1)(j). There the Board had before it an application for certification supported by cards and receipts some ten months old, supplemented by a new card but no new dollar payment. In determining that the union was entitled to outright certification without recourse to a representation vote the Board enunciated its views in the following way:

“Where evidence is submitted in a certification case that employees have applied for membership in the applicant and have made the necessary payment towards the initiation fee or monthly dues of the applicant several months before, but less than a year before, the date of filing of the

application, the Board's normal practice is to direct a representation vote. Where evidence is submitted that employees have applied for membership several months before, but less than a year before, the date of filing of the application, but have made the necessary payment towards initiation fee or dues only a short time before that date, the Board's normal practice is to grant certification. In the first case the Board, despite the fact that its standard respecting membership has been met, considers that it lacks evidence of the desires of the employees which is referable to a reasonable period preceding the date of filing of the application. In the second case, not only has the Board's standard respecting membership been met, but the Board has before it satisfactory evidence of the desires of the employees which is referable to a reasonable period preceding the date of filing of the application. In the one case the Board, in the exercise of the discretion conferred upon it by [section 7(2)] of the Act, directs a representative vote, and in the other case, the Board grants certification.

"We see no logic in holding that an early application for membership and a later payment towards initiation fee or dues are satisfactory evidence of membership, but that an early application and payment and a later act confirming the earlier acts is not. To make such a distinction is to say, in effect, that initial action looking to membership, even though it involves a payment, may only be confirmed to the satisfaction of the Board by a later payment. We are not prepared to establish that requirement. Furthermore, it appears to us that a representation vote would be warranted in this case only on the basis that doubt exists as to the desires of the employees whose membership status is in issue and, in our view, no such doubt exists."

A dissenting view was expressed by then Board member E. Norris Davis:

"The question simply is, "Can the signing of a card and payment of money ten months ago be revitalized by the current signing of an application card so as to raise the evidentiary value to be accorded to that old card and money payment?" In my opinion the question must be answered negatively.

. . .

"In all such proceedings we are seeking the wishes of the employees. It seems to me to be inherently recognized in the Board's statement of policy on membership that the mere signing of an application card in itself is an act of insufficient weight to be interpreted as unequivocally evidencing the wish of the employee to be bargained for collectively. To suggest that such an act, which is in itself not only inconclusive but which would not have been given sufficient weight in an initial application to even entitle the applicant to a vote, can now revive or raise the value of this evidence which is also normally considered as inconclusive by the Board to the extent of making that evidence conclusive of the desires of the employees seems illogical."

24. It will be noted at the outset in respect of the *Firestone* case, that the original evidence here is considerably older than that before the Board in *Firestone*; and even the majority's statement of policy contemplates a monetary payment within the year preceding the certification application. The issue of the Board's discretion to order a representation vote is hardly discussed. Moreover, in the 30 years since *Firestone* was decided, there is not one case which suggests that a mere statement of reaffirmation can so "revive" a two year old membership card, that the Board should not seek the confirmatory evidence of a representation vote; and cases such as *Leon's Furniture Supra* cast serious doubt on this proposition. The position advanced by counsel for the applicant is based upon a fair reading of the *Firestone* decision, but in our view there is considerable merit in the dissenting view in *Firestone* that a mere written statement of continued support cannot be equated to either a further financial commitment, or some more positive form of participation in the affairs of the union. In the present case we have neither. While we do not disavow the general principle enunciated in *Bruinsma*, we are of the view that membership evidence of the vintage tendered by the applicant must be confirmed by something more than a mere statement of continued support, or the Board will exercise its discretion to order a representation vote notwithstanding that more than fifty-five per cent of the employees may, as a matter of law, be "members" of the trade union. However technical or artificial that monetary payment may seem, the fact remains that an employee who has to dig into his own pocket is more likely to be evidencing a real commitment to the trade union's certification than one who does not. The union objects that, for practical purposes, in order to secure outright certification without recourse to a representation vote, it will have to "resign" and collect a "new dollar" from any individual who has not signed his original card within the six months preceding the application date. This may very well be the case, but if so, we do not consider it an unreasonable requirement or a significant impediment to union organizing. The fact that issues such as those present in this case come before the Board so infrequently, suggests to us that the potential problem faced by unions is not a serious one.

25. We wish to summarize our findings on this aspect of the case:

1. The Board finds on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit found by the Board to be appropriate were members of the applicant on June 23, 1980, the terminal date fixed for this application, and the date which the Board determines pursuant to section 92(2)(j) of the Act to be the date for ascertaining membership in accordance with section 7 of the Act.
2. Because a member of the Union's members have not made a recent monetary payment to the Union or confirmed their continued support in a manner more tangible than a simple written statement, we are disposed to exercise our discretion to order a representation vote, and would do so, at this point, were it not for the Union's allegations that the respondent's illegal conduct has made it impossible to ascertain the true wishes of the employees by a representation vote.

26. The Union contends that it is entitled to certification pursuant to section 7a, or in the alternative, that the Board should not exercise its discretion to order a representation vote

because that vote would be pointless and could not accurately reflect employee desires. The respondent and the intervenor resist this contention, and urge the Board to give the respondent's employees the opportunity to express themselves in a representation vote. The interveners also urge the Board not to neglect their charge of misconduct filed against the union itself. To these issues we now turn.

II

27. It was contended by the objecting employees that Giovanni Bierti has been coerced and intimidated into signing a card supporting the trade union. In fact, Mr. Bierti signed two cards. The first was signed in the presence of one "Benedetto", and one "Lippe" who apparently remarked: "What do you want to think about, do you care about your skin?" (and made a gesture slitting his throat.) The second card was signed a day or two later, when Rocco Giordano approached Bierti. There is no suggestion that Giordano threatened Bierti in any way — indeed, Giordano had approached him several times in previous months to solicit his support for the union. Bierti confirmed that there was nothing intimidatory about Giordano's conduct. He was not afraid of Giordano, and Giordano gave him no reason to be. But Bierti also testified that he did not know whether Lippe was a supporter of the trade union, he had made no complaint to management at the time of the alleged threat, and (curiously, in view of the trade union activity which was going on all around him, and had crystalized into an application for certification by the time he gave his evidence) that he was unaware that any employees might be unhappy with the company or might wish to support a union. Moreover, the Board also heard of the friction between Bierti and Lippe, and of the animosity between Bierti and the other employees which Bierti attributed to his Northern Italian origin. Lippe denied making any threat to his fellow employee. Benedetto testified (and it is not disputed) that this was the only card that he had solicited and, as we have already noted, it was superseded by a second card collected by Giordano. Even if Lippe, a rank-in-file employee did threaten Bierti, (and we do not see what other construction we can put upon his gesture) we are satisfied that the incident is isolated, not attributable to the trade union, and cannot affect the outcome of this case.

III

28. The union's charges of misconduct were particularized in 32 paragraphs, involving 20 separate allegations of unlawful interference with its organizing campaign. Some of these allegations were modified or amended during the hearing; some were settled or withdrawn; and some were not seriously pursued. Most of the charges were not substantiated by the evidence — although in so finding, we do not wish to suggest that they were frivolous. There were some instances of illegal activity, as well as circumstances which could give rise to a reasonable suspicion on the part of employees. On balance, however, we are satisfied that the evidence does not demonstrate the kind of concerted or coordinated campaign of illegal conduct suggested by the union's initial statement of allegations.

29. The inquiry into the section 7a application consumed some 16 days of hearing. The Board heard the evidence of 21 witnesses. Seldom has it been faced with such a tangled mass of contradictions. Of course, the witnesses were testifying about events which occurred some time ago, and some of the inconsistencies undoubtedly result from the imperfect recollection of partisans who were faithfully recounting the situation as they saw it. In too many instances, however, the Board was faced with evasion, equivocation, distortion, and outright lies. We do

not think any useful purpose would be served by recounting all of the testimony, or distinguishing between errors, exaggerations, and obvious falsehoods. It is sufficient in our view, if we set out our findings of fact, based upon our assessment of the witnesses' relative credibility, and the plausibility of their various of events. For the purpose of exposition, it will be convenient to deal with each allegation separately, although in determining the applicability of section 7a, we must consider the cumulative affect of any proven unfair labour practices.

30. The latest trade union organizing campaign began in February or March 1980, and resulted in an application filed on June 13. On or about June 6, 1980, Angelo Capozzi, the plant manager, announced the implementation of a new benefit plan. On June 11 or 12, a written statement of the new benefits was provided to all employees. Laura Longo, an employee of the respondent, testified that the circulation of such documents was unusual, and entirely unexpected. She could recall no previous discussion of any impending changes and told the Board that documents such as those circulated immediately prior to the certification application were unprecedented in her seven years with the company. Angelo Capozzi told the Board however that it was the regular practice of the company to review salaries and benefits every Spring after discussions with the employees, and to implement any wage increases early in May. This practice was followed in 1980. There were meetings with the employees beginning in February, and the annual pay increase was implemented in the first pay period in May. The employees were also advised that a revised schedule of benefits would be introduced when appropriate arrangements had been made with a suitable carrier. The decision to improve benefits arose from the earlier discussions and was motivated, at least in part, by a written statement of demands, dated March 14, 1980, which the employees themselves drafted in response to those discussions. This document was signed, *inter alia*, by Mrs. Longo herself, and demands both a wage increase "the way it has been done in previous years", and certain benefits (including a dental plan) which were eventually implemented. Only the dental plan is new. All of the other changes are amendments to the existing schedule of benefits. The evidence also indicates that the established benefits have been revised from time to time, and that when this happened, employees have been given a written statement similar to that circulated early in June.

31. We are satisfied that in revising its benefit package, the company was following its established practice, and responding to its employees' demands. There is nothing improper in its conduct in this regard; nor are we satisfied that certain comments directed to Mrs. Longo about her use of the washrooms constitute unlawful harrassment.

32. Dominic Colatosti told the Board about a meeting he had with the two supervisors in his department on or about May 29, 1980. Colatosti viewed this meeting as a form of intimidation related to his support for the union. It was admitted, however, that this was but one of many meetings which Colatosti had attended to discuss his various problems. These problems included: his ulcer, his back problems, his illnesses, the trauma of the death of a close friend, his problems dealing with the company's customers, his problems with his immediate foreman, his concerns about the distribution of work, the allegedly unfair privileges given to more senior employees, his exclusion from the "family" of such favoured employees, and so on. There was nothing extraordinary about this particular meeting, nor any reference to Colatosti's union activity. We can appreciate the anxiety which a union supporter may have concerning possible reprisals for his trade union sympathies. However, we do not think that there was any impropriety associated with this particular meeting.

33. On or about July 10, 1980, John Cocomile, the solicitor for certain employees opposing the applicant's certification, appeared in the respondent's lunchroom and addressed a number of the employees during their lunch hour. It was alleged by certain union supporters that he said that he was "representing" and "being paid by" the company — although curiously, these witnesses also told the Board that he said he was "neutral", was not there to speak "for or against" the union or the company, and was acting only for the objecting employees. This appearance, it was contended, could only have been undertaken with the connivance of the company and is part of a larger scheme to undermine the union. The incident took place well after the terminal date and thus could have no direct impact on the number of signatures on the petition filed by the objectors.

34. We have carefully considered the evidence of the trade union witnesses, and are satisfied that they honestly related to the Board what they thought they heard. Their evidence however, is not substantiated by a tape which Mr. Cocomile made of his remarks, nor is their version either internally consistent, or easy to square with comments which Mr. Cocomile admittedly made. The Board translator had considerable difficulty understanding Mr. Cocomile's dialect, and perhaps the employees had the same problem. In any event, we are satisfied that there was nothing intimidatory or coercive about Mr. Cocomile's remarks, and that the management would probably not have permitted him to appear if they had known of his intention to do so. There is no illegality associated with this incident, and certainly nothing attributable to the respondent.

35. It is alleged by Laura Longo that one Joe Panapinto made various remarks to her about the necessity of signing the petition because the company did not want the union, would "close its doors" if the union came in, and would lay-off union's supporters. Panapinto did not give evidence, but he was not among the group of employees actively engaged in circulating the petition. Orfeo Bizzotto, the principal petitioner, claimed that Panapinto had not been included because he had a "big mouth". That assessment appears to be an accurate one if Mrs. Longo is to be believed. In any case, we do not attribute Panapinto's remarks to anyone except himself. On the evidence, we cannot attribute his comments to the petitioners and certainly not to the company.

36. It was alleged by Mrs. Longo that Toni Palmisano, one of the petitioners, said that Rolando De Luca was "pushing the employees" to sign against the union. The problem with this evidence (apart from its hearsay quality) is that it only came out at cross-examination. Mrs. Longo's initial evidence made no mention of De Luca in this context; moreover, these statements came immediately after Mrs. Longo repeatedly denied that the recent change in benefits had ever been discussed before. If Mrs. Longo is to be believed, the change in benefits was an entirely unprecedented and wholly unexpected occasion — yet the evidence clearly demonstrates that this was not the case. A similar problem infects her evidence respecting a conversation she allegedly overheard involving a group of individuals including: Angelo Capozzi, Rolando De Luca, and Gino De Persio. It is alleged that De Luca pointed to the women in the vicinity and said: "These are the women who I'm supposed to sign" or "Who have not signed". It is difficult to see how Mrs. Longo could have heard this conversation above the din of the machines, and it was denied by the persons allegedly present. On balance, having regard to her obvious evasions with respect to the benefit issue, we cannot find that the alleged conversation took place in the manner in which she suggested.

37. There is much more substance to the union's contention that some of the

respondent's foremen were involved with the circulation of the petition opposing the union. Orfeo Bizzoto, the principal petitioner is a senior employee and a close friend of Gilbert Giacomini, his foreman. Bizzoto told the Board he has been involved in organizing opposition to the union in past organizing campaigns. On June 17, the day notice of the certification application was posted, Bizzoto was out of town making a delivery; but he discussed the union with Giacomini on the telephone. He returned late in the afternoon, and the very next morning approached Lou Picinni, the traffic manager, to ask for a few days off for "special personal business". Picinni admits that he discussed Bizzoto's proposed "vacation" with Giacomini, that he knew about the possibility of an anti-union petition, and that he even regarded them as "common practice" in certification applications. He maintained however, that he was unaware of opposition to the union, did not see the petition in the plant, never actually saw anyone signing the petition, and did not know Bizzoto was involved. We do not accept these assertions. We find that Picinni and Giacomini were aware of both the purpose of Bizzoto's request and his subsequent activity. Indeed, we accept the union's evidence, and find as a fact, that Bizzoto was regularly on the company premises promoting the anti-union petition, and was in and out of Picinni's and Giacomini's office during the time when he was "on vacation".

38. It may be appropriate at this point to deal with two aspects of the evidence which caused the Board some concern. The general thrust of the petitioners' evidence (with the exception of Gino Calabria, who we found to be generally, and in the circumstances, refreshingly, candid) was that there was almost no activity in support of the petition on company premises during working hours. We do not accept this evidence. We find that there was substantial discussion, debate, circulation of the petition, and solicitation of signatures during working hours, within the confines of the plant, and while foremen were in the proximity. Of course, there is nothing illegal about circulating an anti-union petition on company premises or company time. It is simply that the petitioners' repeated denials cannot be accepted and undermine their general credibility.

39. A similar taint affects the evidence of the respondent's foremen. These foremen had been specifically instructed by senior management to have *no involvement* with any activity against the union; however so anxious were they to convince the Board that this was the case, that many of them denied any *knowledge* of the petition — despite the fact that it was circulated in the plant under their very noses, and employees and foremen alike go into work in the morning. One foreman not only denied any knowledge of the union, its organizing campaign, the petition and *any* discussion with management about the union or the way to respond to it, but also went so far as to tell the Board that he was unaware that any employees even wanted a trade union until July when he learned he would be giving evidence. It is conceivable that some foremen might not have been aware of the extent of trade union organization or petition activity, but we are satisfied that the mass blindness apparently afflicting most of the foremen was of the wilful variety. We find that the company's foremen were generally well aware of the petition activity going on around them, on the plant floor, during breaks and lunch hours, and outside the factory. But awareness, wilful blindness, or calculated indifference, do not amount to unlawful interference; and it is unlawful interference which the applicant must demonstrate if it is to be successful under section 7a.

40. The Board has no doubt that there was unlawful interference with employee rights in at least one instance. That instance involves Gilbert Giacomini, the driver foreman, and Toni Spadafora, a driver with the respondent for more than 16 years. On Friday, June 20th,

Spadafora was summoned to Giacomini's office where he was told that he must "vote against the union" or the company would "close its doors", and that Orfeo Bizzoto was outside the plant with the petition that he must sign. Spadafora signed. This incident not only constitutes a breach of sections 56, 58 and 61 of the Act, but also strengthens the inference that Giacomini at least, was closely associated with the circulation of the petition, and was actively assisting Bizzoto to solicit support.

41. Bizzoto himself was not above intimidatory comments if it served his end. He led Sergio Greci to believe that he was acting on behalf of the company and suggested that if he (Greci) did not sign the petition he would have problems, be placed on a black list, and eventually discharged. Greci signed the petition. We find that Bizzoto's comments constitute a breach of section 61 of the Act, although we are not satisfied that he was acting on behalf of the respondent and do not attribute this particular threat to it.

42. The foregoing constitute the only specific breaches of the Act which, in our view, were sustained on the evidence. We do not think it is necessary to deal further with those allegations which were not borne out by the facts.

43. Is the respondent's breach sufficient to justify the issuance of a certificate pursuant to section 7a; or, to address the principal issue directly, can the true wishes of the employees be ascertained by a Board-supervised secret ballot vote? In answering that question it is helpful to compare the situation here with that in cases such as *Radio Shack* [1979] OLRB Rep. Dec. 1220, *Skyline Hotel* [1980] OLRB Rep. Dec. 1811, *K-Mart* [1981] OLRB Rep. Jan. 60 or *Norseman Plastics* [1979] OLRB Rep. April 325. Here there are no discharges, demotions, transfers or layoffs. There are no "captive audience" or small group meetings. There are no speeches or anti-union leaflets. There is no overt surveillance or any systematic attempt to identify, isolate or discriminate against union supporters. There is no evidence of widespread threats or other coercive activity attributable to the respondent. The evidence simply does not demonstrate a co-ordinated or concerted campaign of illegal conduct, and the illegal conduct which did occur was not prompted by any direction from above, but happened despite the explicit instructions of senior management that foremen were not to involve themselves in activity for or against the union. Not only were senior management not involved, Arthur Pelliccioni, the vice-president and general manager, was considered to be an honourable man, respected by both supporters and opponents of the union.

44. We accept the union's contention that many of its supporters were fearful that the company would close or they would be blacklisted if they continued to support the union. We also accept that rumours to this effect were circulating in the plant and that such speculation would necessarily be fueled by the threats made by Bizzoto and Giacomini. In all the circumstances however, we are satisfied that an appropriate remedial order fashioned pursuant to section 79, will be able to create an atmosphere in which the true wishes of the employees can be ascertained by a Board supervised representation vote. In a bargaining unit of this size employees need no fear that their preferences will be made known; and if the general manager assures them that they will not be subject to reprisals from over-zealous foremen, we are satisfied that a vote can be fairly conducted. Accordingly, the Board directs the respondent to post at its place of business, copies of the attached notice ("appendix"). Copies of such notice, to be furnished by the Registrar, shall, after being duly signed by Arthur Pelliccione, be posted immediately and the posting must be maintained for a period of 60 consecutive working days there-after in conspicuous places including all places where notices

to employees are customarily posted. Reasonable steps shall be taken by the respondent to ensure that such notices are not altered, defaced, or covered by any other material. Representatives of the complainant union shall have reasonable access to the respondent's premises to ensure that the respondent has complied with this directive. The Board also directs the respondent to mail, without comment, a copy of this notice to all employees in the bargaining unit and to all of the respondent's managerial personnel.

45. The Board repeats its finding that more than fifty five per cent of the employees of the respondent at the time the application was made, were members of the applicant on June 23, 1980, the terminal date fixed for this application and the date which the Board determines pursuant to section 92(2)(j) of the Act to be the date for ascertaining membership under section 7. The Board further directs that a representation vote be taken among the employees in the above described bargaining unit. Such vote shall not take place until the Board's remedial order has been fully complied with. Those entitled to vote will be all employees of the respondent on the date hereof who do not terminate their employment between the date hereof and the date on which the vote is taken.

46. The matter is referred to the Registrar.

Appendix

The Labour Relations Act

970

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A HEARING IN WHICH THE COMPANY, THE UNION AND THE REPRESENTATIVES OF THE EMPLOYEES OPPOSING THE UNION, ALL HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE BOARD FOUND THAT ONE OF OUR FOREMEN HAS UNLAWFULLY INTERFERED WITH THE RIGHT OF EMPLOYEES TO JOIN OR NOT TO JOIN A TRADE UNION. THE BOARD ALSO FOUND THAT THIS FOREMAN WAS NOT ACTING ON BEHALF OF SENIOR MANAGEMENT BUT, ON THE CONTRARY, WAS DISREGARDING THE INSTRUCTIONS OF SENIOR MANAGEMENT THAT FOREMEN WERE NOT TO BE INVOLVED IN ACTIVITY FOR OR AGAINST THE UNION. THE BOARD HAS ORDERED US TO INFORM ALL OF OUR EMPLOYEES OF THEIR RIGHT:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN OR HELP UNIONS;
- TO BARGAIN AS A GROUP THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE THINGS,

ALL OF THESE RIGHTS ARE GUARANTEED BY LAW.

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS.

WE HAVE INSTRUCTED ALL OF THE FOREMEN THAT THEY ARE NOT TO INTERFERE WITH ANY OF THESE RIGHTS IN ANY WAY.

WE WILL NOT TAKE ANY ACTION OF ANY KIND AGAINST ANY EMPLOYEE BECAUSE HE OR SHE SUPPORTS A TRADE UNION.

WE WILL NOT PERMIT ANY OF OUR FOREMEN TO TAKE ANY ACTION OF ANY KIND AGAINST ANY EMPLOYEE BECAUSE HE OR SHE SUPPORTS A TRADE UNION.

WE WILL NOT CLOSE THE PLANT IF THE EMPLOYEES DECIDE TO SUPPORT A TRADE UNION.

THE BOARD HAS DIRECTED THAT THERE WILL BE A REPRESENTATION VOTE SO THAT THE EMPLOYEES WILL HAVE AN OPPORTUNITY TO DECIDE WHETHER OR NOT THEY WISH TO BE REPRESENTED BY THE TRADE UNION. THIS REPRESENTATION VOTE WILL BE SUPERVISED BY THE ONTARIO LABOUR RELATIONS BOARD. EMPLOYEES WILL BE FREE TO VOTE FOR OR AGAINST THE UNION. IF THE MAJORITY OF EMPLOYEES VOTE IN FAVOUR OF THE UNION, AND THE BOARD CERTIFIES THE UNION AS THE EMPLOYEES' REPRESENTATIVE, WE WILL BARGAIN IN GOOD FAITH WITH THE UNION AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.

"ARTHUR PELLICCIONE"

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

DATED this 9TH day of JULY, 1981.

Appendice

Legge sui Rapporti Lavorativi

AVVISO AGLI IMPIEGATI

Affisso per Ordine della Commissione dell'Ontario per i Rapporti Lavorativi

ABBIAMO PUBBLICATO QUESTO AVVISO A ESECUZIONE DI UN ORDINE DELL'ONTARIO LABOUR RELATIONS BOARD, EMESSO IN SEGUITO AD UN'UDIENZA DURANTE LA QUALE SIA LA COMPAGNIA, CHE IL SINDACATO ED I RAPPRESENTANTI DEI DIPENDENTI CHE NON VOGLIONO IL SINDACATO HANNO AVUTO TUTTI LA POSSIBILITÀ DI ESPORRE I LORO ARGOMENTI. IL BOARD HA CONCLUSO CHE UNO DEI NOSTRI "FOREMEN" HA IMPEDITO ILLEGALMENTE AI DIPENDENTI DI ESERCITARE IL LORO DIRITTO DI ADERIRE, O DI NON ADERIRE, AL SINDACATO. IL BOARD HA ANCHE CONCLUSO CHE QUESTO "FOREMAN" NON HA AGITO A NOME DEI DIRIGENTI, MA CHE, AL CONTRARIO, NON HA TENUTO CONTO DEGLI ORDINI DATI DALLA DIREZIONE, SECONDO I QUALI I "FOREMEN" NON DOVEVANO INTROMETTERSI NELLE ATTIVITÀ A FAVORE O CONTRO IL SINDACATO. IL BOARD CI HA ORDINATO DI INFORMARE TUTTI I NOSTRI DIPENDENTI DEL LORO DIRITTO:

- A ORGANIZZARSI;
- A FORMARE SINDACATI, AD ADERIRVI E A COLLABORARE ALLE ATTIVITÀ DEGLI STESSI;
- A TRATTARE COME GRUPPO PER IL RINNOVO DEI CONTRATTI, ATTRAVERSO UN RAPPRESENTANTE DI PROPRIA SCELTA;
- AD AGIRE IN GRUPPO PER TRATTATIVE COLLETTIVE;
- A RIFIUTARE DI FARE UNA QUALSIASI, O LA TOTALITÀ DELLE COSE DI CUI SOPRA.

TUTTI QUESTI DIRITTI SONO GARANTITI DALLA LEGGE.

NOI NON FAREMO NULLA PER IMPEDIRE L'ESERCIZIO DI QUESTI DIRITTI.

ABBIAMO DATO DIRETTIVE A TUTTI I "FOREMEN" DI NON OSTACOLARE IN ALCUN MODO L'ESERCIZIO DI QUALSIASI DI QUESTI DIRITTI.

NOI NON PRENDEREMO PROVVEDIMENTI DI NESSUN GENERE A CARICO DI DIPENDENTI, A MOTIVO DELLA LORO APPARTENENZA AL SINDACATO.

NON PERMETTEREMO A NESSUNO DEI NOSTRI "FOREMEN" DI PRENDERE PROVVEDIMENTI DI NESSUN GENERE A CARICO DI DIPENDENTI, PERCHÉ SOSTENGONO IL SINDACATO.

NOI NON CHIUDEREMO LA NOSTRA FABBRICA SE I LAVORATORI DECIDERANNO DI APPARTENERE AL SINDACATO.

IL BOARD HA DATO DISPOSIZIONI AFFINCHÉ SI TENGA UNA VOTAZIONE PER LA RAPPRESENTANZA, IN MODO CHE I DIPENDENTI ABBIANO LA POSSIBILITÀ DI DECIDERE SE VOGLIONO O MENO ESSERE RAPPRESENTATI DA UN SINDACATO. QUESTO VOTAZIONE SI SVOLGERÀ SOTTO LA SORVEGLIANZA DELL'ONTARIO LABOUR RELATIONS BOARD. I DIPENDENTI AVRANNO PIENA LIBERTÀ DI VOTARE A FAVORE O CONTRO IL SINDACATO. SE LA MAGGIORANZA DEI DIPENDENTI VOTERANNO A FAVORE DEL SINDACATO, ED IL BOARD RICONOSCERÀ UFFICIALMENTE IL SINDACATO COME RAPPRESENTANTE DEI DIPENDENTI, NOI CI IMPEGNIAMO A TRATTARE IN BUONA FEDE CON IL SINDACATO, ED A FARE OGNI RAGIONEVOLE SFORZO PER CONCLUDERE UN CONTRATTO COLLETTIVO.

"ARTHUR PELLICCIONE"

**Questo è un avviso ufficiale della Commissione e non si
deve rimuovere o sfregiare.**

Questo avviso deve rimanere affisso per 60 giorni di lavoro consecutivi.

2044-80-R; 2045-80-U Service Employees' International Union, Local 183, A.F.L., C.I.O., C.L.C., Applicant, v. **Robin Hood Multi-Foods Inc.**, Respondent, v. Group of Employees, Objectors

Certification – Interference in the Trade Union – Section 7a – Employer actively discouraging union organizing and encouraging infiltration and surveillance of union – Whether remedial order without certification under section 7a – Extensive review of impact of violations on employees

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and O. Hodges.

APPEARANCES: *C. M. Mitchell, P. Brennan, J. Nicholls and P. Marier for the applicant; B. Burkett, B. Lachman and J. Huncar for the respondent; K. O'Hara for the objectors.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES;
July 24, 1981

1. The name: "Robin Hood Multifoods Limited" appearing in the style of casue of these matters as the name of the respondent is amended to read: "Robin Hood Mutli-Foods Inc."
2. File No. 2045-80-U is a complaint under section 79 of *The Labour Relations Act*, which alleges that the respondent has contravened sections 56, 58 and 61 of the Act. File No. 2044-80-R is an application for certification in which the applicant has requested that it be certified as the bargaining agent for full-time and part-time bargaining units of the respondent's employees pursuant to the provisions of section 7a of the Act.
3. In support of its request to be certified pursuant to section 7a, the applicant relied upon the matters raised in the section 79 complaint. Accordingly, the Board consolidated the files on the agreement of the parties and accorded full standing to the group of employees objecting to the application for certification, to participate in the consolidated proceedings.
4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.
5. Having regard to the submissions of the parties and their partial agreement with respect to bargaining unit description, the Board finds that all employees of the respondent at Trenton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, quality control technicians, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining. This unit is hereinafter referred to as "bargaining unit #1".
6. Having further regard to the submissions of the parties and their partial agreement with respect to bargaining unit description, the Board finds that all employees of the respondent at Trenton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff, and quality control technicians, constitute a unit of employees of the respondent appropriate for collective bargaining. This unit is hereinafter referred to as "bargaining unit #2".

7. The respondent produces a variety of frozen convenience foods at its Trenton plant. On the date of the application for certification (December 17, 1980), it employed a total of 214 employees in the two bargaining units described above, 203 of whom were in bargaining unit #1 and 11 of whom were in bargaining unit #2.

8. The applicant's organizing campaign commenced in June of 1980. It appears from the evidence that members of management did not become aware of any organizational activities until mid-September. John Huncar, the General Manager of the respondent's Trenton plant, testified that he first became aware that a union was attempting to organize employees at the plant "about mid-September" when he was "made aware of it through a couple of phone calls from employees" and "through Ellie Martin", a lead hand on the evening shift. Mr. Huncar immediately called a meeting of the five foremen and the supervisor at which he expressed his surprise and disappointment that "somehow the employees at the plant had seen fit to go to someone else to resolve their problems." He instructed them to "make themselves as available as possible to people at the plant to see if [they] could learn what the issues were." When asked in examination in chief if he requested the other members of management to report back to him, he responded: "Yes I did but unfortunately there was no response. I felt they weren't really aware of what was going on or there was no communication with the employees." He also stated during cross-examination: "I told the foremen that I was unhappy about third party interference. They knew of my views right from the start." During cross-examination Mr. Huncar also advised the Board that he told the foremen to "keep their noses clean and stay out of union operations." However, he also expressed the view that what a foreman did "off company premises on his own time was his own business."

9. In the latter part of September, the respondent recalled "30 to 40 part-time employees" who had been laid off since July. (It appears from the evidence that employees classified by the respondent as "part-time" frequently work more than twenty-four hours per week. However, none of the parties suggested that the Board should depart from its normal practice with respect to distinguishing between full-time and part-time employees.) In addition, the respondent hired "30 or 40 additional part-time employees" in October. Mr. Huncar held a meeting of all employees to inform them that the respondent was going to hire "additional part-timers" and "to indicate to them not to be concerned because of the part-timers." Mr. Huncar's explanation for the substantial increase in the workforce was that the advertising of "Robin Hood" products had increased sales and that the respondent's "co-packer had expanded its business into U.S. markets and required additional products to fill those pipelines."

10. Ross Gozzard, a cook employed by the respondent, testified that he heard rumours at the end of July "that there was a union trying to get membership cards signed." Near the end of August he was asked to sign a card by another employee (Ken Thrussell) but declined to do so. In September, some of the people with whom Mr. Gozzard worked began to discuss the union. Mr. Gozzard told them that he "didn't know that much about unions" and that "as far as [he] was concerned, what [he and other employees] were being paid by the Company was very fair" so "he didn't see any need to have a union." At some time during the fall of 1980, Robert Hess, the evening shift production foreman, asked Mr. Gozzard in the production office what he thought about the union activity that was going on. Mr. Hess told the Board that he had heard "through general conversation here and there" that "Ross didn't like unions." After Mr. Gozzard expressed the view (which Mr. Hess had anticipated) that a union was not needed because the Company was fair to its employees, Mr. Hess suggested that he "go

and see Mr. Huncar in the morning.” Although Mr. Huncar attempted to give the Board the impression that Mr. Gozzard came to his office unannounced and completely on his (Mr. Gozzard’s) own initiative, Mr. Hess, who was also called as a witness by the respondent, testified that following his conversation with Mr. Gozzard, he (Mr. Hess) wrote a note to Mr. Huncar that said that “Ross was our kind of guy” and that Mr. Huncar “should meet Ross.” Mr. Hess agreed in cross-examination that he was “confident that Mr. Huncar would know what it was about.” Thus, the testimony of one of the respondent’s own witnesses corroborates Mr. Gozzard’s testimony that Mr. Hess initiated the contact with him and facilitated his recruitment to assist the respondent in its surveillance of union activities and infiltration of the union.

11. There is a substantial conflict in the evidence concerning what transpired when Mr. Gozzard and Mr. Huncar met in the latter’s office. Mr. Huncar testified that Mr. Gozzard stated that he had no interest in the union as a result of mistreatment or lack of protection of him and his father by a union at his previous place of employment. He also testified: “I responded to him by saying again you have the same rights as any person for or against the union. If you wish so, express them.” When asked in examination in chief if he ever advised Mr. Gozzard to infiltrate the trade union and obtain any information, Mr. Huncar stated: “If there was any infiltration it was at his own volition.” Mr. Gozzard, on the other hand, gave the following evidence with respect to that meeting:

“The next morning after my shift ended at 7:00 I went and changed my clothes and I waited to see Mr. Huncar. I went into his office. There was just John and I there. He asked me how things were going. There was two or three minutes of small talk. Then he asked me what I thought about the union. I said I didn’t think that we needed one — we were being treated fairly as it was. He told me: ‘Well, let’s get down to bare knuckles and lay our cards on the table.’ Those were his words. He requested that I find out what I could about the union organizing in the plant and to approach either Ken Thrussell or Sam Misfud (another full-time employee) and let them know that I was interested in the union and wanted to find out more about it, and that I would relay information that I had to himself or to Bob Macaulay or Robert Hess

Question: What information?

Answer: As to what union was organizing and the people who were organizing.

Question
(By Board
Member

Hodges): He wanted the names of people?

Answer: Yes.

• • • •

Question: Did he offer you anything?

Answer: He said that he'd make it worth my while.

Question: What? For what?

Answer: He didn't say exactly what. I took it to mean for gathering information about the union."

The Board found Mr. Gozzard to be an honest witness who testified in a candid and forthright manner. Mr. Huncar, on the other hand, was less than candid with the Board concerning a number of matters of substance, several of which are detailed below. Accordingly, the Board accepts and relies upon the evidence of Mr. Gozzard with respect to what occurred during his meeting with Mr. Huncar.

12. It is somewhat unclear from the evidence when Mr. Gozzard's meeting with Mr. Hess and his first meeting with Mr. Huncar occurred. It was Mr. Gozzard's evidence that those meetings occurred in September. However, it was also his evidence that the meetings took place during the week before his shift "changed" (i.e., before he began working many hours of overtime). When he was permitted to view his time cards which indicated that he did not begin working extended hours until late October, he candidly advised the Board that he had given the Board his recollection to the best of his ability, but that in light of the information on the time cards, he was uncertain of the month in which his first meeting with Mr. Huncar had occurred. Mr. Huncar testified that the meeting occurred in late September or early October. However, Mr. Hess indicated that the meetings in question occurred in the first week in November. Although the matter is not entirely free of doubt, the Board finds that the meetings likely occurred in late September or early October. It is probable that Mr. Hess approached Mr. Gozzard pursuant to the instructions which he and the other members of management received from Mr. Huncar in mid-September, to attempt to communicate with employees to learn what the issues were. It is unlikely that Mr. Hess would have waited two months to act upon those instructions.

13. As a result of his meeting with Mr. Huncar, Mr. Gozzard approached Mr. Mifsud and expressed interest in the union. Mr. Mifsud provided him with the business card of Phyllis Marier, one of the applicant's organizers, which had the name of the applicant on the front of it and Ms. Marier's room number at the Wandlyn Inn (the "Wandlyn"), a motor inn located near the plant, on the back of it. Mr. Mifsud told Mr. Gozzard that if he wanted to know more about the union, he could phone Ms. Marier at the Wandlyn. He also suggested that if Ms. Marier was not available, Mr. Gozzard could speak with Jack Nicholls, the applicant's general organizer. Mr. Mifsud also informed him that between 40% and 50% of the employees had already signed union cards. After phoning Ms. Marier from his home to set up a meeting, Mr. Gozzard phoned Mr. Huncar at the plant and gave him all of the information which he had obtained from Mr. Mifsud. When Mr. Gozzard told Mr. Huncar that he would not be able to attend the meeting which he had arranged with Ms. Marier because he had been scheduled to work at that time, Mr. Huncar told him not to worry as he (Huncar) would arrange to have another person cover for him. Mr. Huncar also told him to "lead [Ms. Marier] on a bit to make her more interested by indicating that he (Mr. Gozzard) would have access to the plant seniority lists." Although Mr. Gozzard had spoken with Mr. Huncar on "three or four occasions" prior to their initial discussion about the union, their conversations became considerably more frequent after that initial discussion.

14. Mr. Huncar also instructed Mr. Gozzard to extend his breaks and take extra breaks as required to gain access to speak to other employees about the union. Mr. Gozzard availed

himself of this privilege several times. Mr. Gozzard spoke with a number of employees and asked them if they had heard anything about the union and if they had signed a card. He also told them that management knew who had signed union cards and that their jobs would be in jeopardy. His explanation for making those statements, which he had no reason to believe to be true, was that he thought he “was doing the right thing discrediting the union to keep them out of the plant” and he “thought that it was in [his] best interest and in the Company’s best interest.” He also testified that during one of his meetings with Mr. Huncar, he (Mr. Huncar) told him that people could be convinced to change their minds about the union “by telling them that the Company knew who had signed cards and that they could be weeded out.”

15. Mr. Gozzard also discussed the matter of the union with Keith O’Hara, the lead hand who appeared before the Board as the representative of the objectors, and with Robert Macaulay, the day shift production foreman. Mr. O’Hara is a senior lead hand who has worked in the plant for five years and is generally regarded by employees as being Mr. Macaulay’s “righthand man”. Mr. Macaulay, who has been a foreman for three years, is in the opinion of Mr. Huncar, “very definitely the most important foreman in the plant”. It was Mr. Gozzard’s evidence that he, Mr. Macaulay, and Mr. O’Hara, were of the view that whatever they had to do to stop the union from getting into the plant would be worthwhile for them and for the plant.

16. Mr. O’Hara came to Mr. Huncar’s office in early October to discuss the union. Mr. Huncar testified that Mr. Hess told him that Mr. O’Hara wanted to see him but this evidence is contradicted by the evidence of Mr. Hess, who testified that he was “told to tell O’Hara that Mr. Huncar would like to talk to him.” At the meeting which Mr. Huncar arranged through Mr. Hess, Mr. O’Hara told Mr. Huncar that he had been approached to join the union. Mr. Huncar then asked him who had approached him. “A week or two later”, Mr. O’Hara and Mr. Huncar met again in the latter’s office. During that meeting, Mr. Huncar expressed the view that he “wasn’t sure, but [he] believed that [if the union got in] all benefits would become negotiable”. Mr. Huncar met with Mr. O’Hara “four or five” more times. During one of those meetings, Mr. Huncar “heard about a petition” from Mr. O’Hara. The evidence indicates that Mr. O’Hara circulated a petition against the union and attempted to intimidate at least one employee, Margaret Barriage, into refraining from calling employees in support of the union by telling her that “Mr. Huncar isn’t going to like this” and by saying: “We’ll see who’s working here and who’s not.” Mr. O’Hara, who was present throughout the hearing of this matter, chose not to testify despite the fact that the Board indicated to him that his petition, if proven to be “voluntary”, could be of relevance to the issue of whether the applicant has “membership support adequate for the purposes of collective bargaining” within the meaning of section 7a of the Act.

17. Mr. Hess testified that he told the lead hands that “if an employee talked to a lead hand about someone approaching them to sign union cards or someone who wanted to know what they could do against union activity”, the lead hand should “suggest to the person that if they wanted to talk to someone Mr. Huncar’s door was always open and they could also talk to Keith O’Hara.” Mr. Hess also testified that he heard from one of his lead hands that Mr. O’Hara “would be starting a petition.” Thus, it is clear from the evidence that Mr. Hess through his lead hands steered employees to Mr. O’Hara, another lead hand, whom he had heard would be circulating a petition against the union. Mr. Hess described Mr. O’Hara as being “senior in terms of responsibilities” to the female lead hands. It was also his evidence that lead hands were “the normal conduit” between himself and the employees and that “employees

know that to be the case.” He further testified that he “regarded lead hands as completely different from normal employees” and that he “regarded them as management in that they were in between [him] and the employees.” Mr. Macaulay also testified that he knew that Mr. O’Hara was involved in circulating a petition and that, accordingly, he would refer any employees who asked him about it to Mr. O’Hara. When asked how he knew about this, he replied: “I just knew. Keith could have told me or whatever.” Later in his evidence he conceded that it “could be” that he “never actually opened his eyes to see it” (the petition being circulated in the plant), and that he could have “overlooked it” since he “overlooks a lot of things.”

18. Near the end of October, Mr. Gozzard began to work an unusually large number of hours of overtime. This continued for “four or five weeks” until the last week of November. Mr. Huncar’s explanation for the significant increase in overtime hours worked by Mr. Gozzard was that Paul Robertson, one of the cooks in the evening shift, was promoted to lead hand because of increased volume. Thus, it was necessary to train new cooks to replace him. During the training period, one of the day shift cooks remained at work for several hours per day beyond his normal quitting time and Mr. Gozzard, whose normal hours of work extended from 11:00 p.m. to 7:00 a.m., came to work several hours earlier than normal to assist in training the new cooks. However, Mr. Gozzard was of the view that another reason for the change was to provide him with greater access to employees for the purpose of discussing the union, as during one of his meetings with Mr. Huncar, he (Mr. Gozzard) told him that he was not really in a position to talk to anyone since he was on the midnight shift and most of the employees worked on the other two shifts. Mr. Huncar subsequently asked him if he wanted to take over the position of cook on the evening shift but Mr. Gozzard declined to do so because it would greatly interfere with his family life. The expansion of Mr. Gozzard’s working hours was later agreed upon as an acceptable alternative. Although *bona fide* manpower considerations no doubt provided some of the justification for the substantial increase in Mr. Gozzard’s hours, it is reasonable to infer that the increased access to employees which such change would provide to Mr. Gozzard during a period in which to the knowledge of management anti-union activities were increasing in frequency and intensity was not overlooked by management in deciding how to meet its staffing requirements. Moreover, the substantial number of overtime hours provided Mr. Gozzard with a financial reward for his surveillance and other anti-union activities.

19. In early November, Mr. Huncar called a meeting of all employees to announce that Nestles Enterprises Ltd. (“Nestles”) was negotiating with the respondent with a view to purchasing the respondent’s Trenton plant. (Those negotiations culminated in an agreement of purchase and sale being entered into in December of 1980, which, at the time that the parties submitted their written arguments with respect to this case, was still under consideration by the Foreign Investment Review Agency.) Mr. Huncar called the meeting as soon as he became aware that rumours of the “take over” were circulating in Trenton. He attempted to reassure the employees, who were concerned about their job security, pensions and fringe benefits, by telling them about the Nestles “success story” in an Ohio plant which they had acquired, at which production had doubled with seniority and fringe benefits being maintained for all employees.

20. On or about November 7, 1980, the applicant distributed the following letter (typed on union letterhead) to union members employed by the respondent:

"To All Union Members of
Robin Hood Multifoods,
TRENTON, Ontario

Dear Sisters and Brothers:

It is with great pleasure that we can report to you that our organizing campaign, presently being conducted at your plant is progressing favourably. At present, we have over 100 *SIGNED CARDS* in support of your Union.

From the meeting on Thursday, November 5, 1980, held at the Robin Hood Multifoods plant, came the distinct possibility that there may be a change of companies. In the event that Robin Hood Multifoods does sell to Nestle's Company, Ltd., *IT IS IMPERATIVE TO YOU TO PROTECT YOUR RIGHTS.*

THIS CANNOT BE DONE WITHOUT UNION REPRESENTATION AND WE URGE YOU TO URGE YOUR FELLOW EMPLOYEES TO SIGN THEIR UNION CARDS NOW!! AS WITH A NEW EMPLOYER, YOU HAVE NO SAY AND YOU COULD LOSE ALL YOUR SENIORITY, BENEFITS AND YOUR JOBS, WITHOUT UNION REPRESENTATION!!

REMEMBER: SECTION 3 of the Ontario Labour Relations Act says:

'EVERY PERSON IS FREE TO JOIN A TRADE UNION OF HIS CHOICE AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES (This is law!)

We thank you for your support and we urge you to please ask your fellow employees to sign their union cards as soon as possible, so we can protect your rights, under the Ontario Labour Relations Act.

Fraternally yours,

(signed) J. H. Nicholls
General Organizer

(signed) Phylis Marier
Organizer Local 183"

21. On that same day, Deanna Mullin, an administrative assistant to Mr. Huncar whose responsibilities include personnel matters, met with "about six employees" one at a time for "ten to twenty minutes" per interview, in the plant superintendent's office. These interviews were conducted on the instructions of Mr. Huncar, Ms. Mullin directed the lead hands to "bring the girls to [her] one at a time off the lines." Ms. Mullin told the Board that she "chose

the six at random". She testified that the series of interviews, which was an unusual event that had never happened before at the plant to the best of her knowledge, was conducted to find out if the employees had any "concerns" over the Nestles take-over and to find out if there were any "problems" on the floor. Ms. Mullin admitted that during one of the interviews she asked one of the employees whom she had hired if that employee "knew of any union activity in the plant." That employee "expressed concern that she would lose her job if she had signed a card", but Ms. Mullin told her that she could not lose her job for that reason. Ms. Mullin also testified that she did not think that she expressed a view to that employee about the union but that she (Ms. Mullin) "might have said that [she] didn't think that the employees needed a union." Under cross-examination, she conceded that she told the employee that she could write to the union if she wanted to get her card back. One of the other employees whom she interviewed that day "brought up the union" and expressed the view that the employees did not need a union. When asked in cross-examination why she did not interview more than six employees, she said that she "didn't have time." Under further cross-examination concerning why she did not hold further interviews during the following week, Ms. Mullin became quite evasive and stated: "We just didn't We just didn't have anymore." In view of the timing of those interviews and the manner in which they were conducted, the Board finds that Mr. Huncar and Ms. Mullin knew or should have known that the employees who were interviewed and the other employees in the plant who would doubtlessly become aware of the interviews, would reasonably perceive them to be related to the union organizing campaign. Moreover, the Board finds on the balance of probabilities that management intended the interviews to have a chilling effect on the union organizing campaign.

22. During the first week of November, Mr. Macaulay arranged for a meeting to be held at the Wandlyn after the day shift on Saturday November 8th. Mr. Huncar testified that Mr. Macaulay did not tell him about that meeting until the day of the meeting when (according to Mr. Huncar) he (Mr. Macaulay) told him that "there had been a suggestion on the floor by some of his (Macaulay's) employees that they should go out and have a few drinks and discuss things that might be bothering them — some questions that people might want to ask pertaining to the union." However, that statement was contradicted by the evidence of Mr. Macaulay, who was excluded from the hearing room while Mr. Huncar gave evidence. Mr. Macaulay testified as follows (during cross-examination): "I talked to Mr. Huncar about the November 8th meeting at the Wandlyn during that week. I suggested to Mr. Huncar that we have the meeting since we were working that Saturday. He told me that what I did on my own time was my own business. He said if I wanted to I was free to come — I could talk all I wanted about the union off the premises of the plant." It was also Mr. Macaulay's evidence that the information about the meeting was "very open — everyone knew." He further testified: "We talked about [the meeting] all week long. If anybody came by I asked them if they were coming over on Saturday to have a beer with me and the guys." Mr. Macaulay invited Mr. Gozzard and Mr. O'Hara, whom he knew to be opposed to the union, to attend the meeting. Mr. Macaulay testified that he told Mr. O'Hara "that it was going to be about the union because he wanted to have them there for sure." Mr. Gozzard testified that Mr. Macaulay "expressed that we (Messrs. Macaulay, O'Hara and Gozzard) should do whatever we thought was needed to turn them around." Mr. Macaulay initially testified that the purpose of the meeting was merely "to find out if the guys had any problems." However, he conceded in cross-examination that the purpose was to talk about the union, and he admitted that he arranged for one of the anti-union employees to bring up the subject of the union. His evidence on that point was: "He was to bring it up. I didn't want to bring it up myself. I wanted it to appear as coming from him." He also stated that he "had the same arrangement with O'Hara." Mr.

Macaulay testified that he “probably” invited Roger Sturgeon to the meeting. Pat Corrigan and Ken Thrussell were also invited to attend along with several other employees who were known to be in favour of the union. Having regard to all of the evidence, the Board finds that the purpose of the meeting was to discredit the union and to “turn around” union supporters, i.e., to try to change their minds about the union. Mr. Huncar gave his tacit approval to the meeting by telling Mr. Macaulay that what he (Macaulay) did away from the premises of the respondent on his own time was his own business. A total of approximately 10 persons attended the meeting. After approximately half an hour of “small talk”, Mr. Gozzard said: “Let’s cut all the bull and get down to what we are here for.” After that Messrs. Macaulay and O’Hara did most of the talking. Mr. Macaulay “backed up” Mr. O’Hara’s statement that if the union got into the plant, the Company would take away all of the benefits which the employees had, including the medical plan, dental plan, boot allowance, uniforms and hair nets, and the employees would have to negotiate all benefits. These comments were addressed to Messrs. Corrigan and Sturgeon in particular. Mr. Macaulay asked them how many years of bargaining it would take to regain all of those benefits. Although Mr. Macaulay denied doing so, having regard to the relative credibility of Mr. Gozzard and Mr. Macaulay, we accept Mr. Gozzard’s evidence that during the November 8th meeting at the Wandlyn, Mr. Macaulay gave Mr. Corrigan and Mr. Sturgeon a slip of paper on which he had written an address to which they could send a registered letter to get their union membership cards back. Mr. Macaulay also indicated that if people wanted to rent a room or a hall for a meeting of all employees to discuss the union, he would see what he could do about making arrangements for them. Mr. Macaulay denied in cross-examination that by the time he left the meeting (after being there for over two and one half hours) he was “sure” that Messrs. Corrigan and Sturgeon were against the union. However, in response to the question: “You hoped so?”, he replied: “You could say that.” After he left the meeting, Mr. Macaulay telephoned Mr. Huncar and told him “how it had gone and what people had said.”

23. Following that meeting, Messrs. Sturgeon and Corrigan became very active opponents of the union. Mr. Sturgeon gave copies of the union address to a number of employees in the plant with a view to having them write to request the return of their membership cards, and attempted to persuade at least one of them to sign a petition against the applicant by telling her that Mr. Huncar knew everyone who had signed the union card. It is reasonable to infer that the idea of using that approach as a persuasive tactic came from management since it is similar to the aforementioned suggestion which Mr. Huncar made to Mr. Gozzard that people could be convinced to change their minds about the union “by telling them that the Company knew who had signed cards and that these people could be weeded out.” Mr. O’Hara also circulated in the plant photocopies of a sheet from Mr. Macaulay’s desk calendar with the union address on it for the purpose of attempting to persuade employees to write to the union to revoke their membership cards.

24. Mr. Huncar testified that Messrs. O’Hara, Sturgeon and Corrigan “appeared” uninvited at his home at 11:00 o’clock one evening in late November or early December and discussed “what they thought they knew about the union activity to sign up employees and what their general feeling was about the union itself.” He further testified: “They told me that there was a split in the plant atmosphere — that the employees were no longer cohesive. I think that was the gist of our meetings.” In response to the information, Mr. Huncar “expressed disappointment” that organizational activities were going on, but “expressed gratification that people would come to [him].” During examination in chief, Mr. Huncar testified that the employees in question had been to his home on a number of prior occasions to fish in his back

yard and to have a few drinks. However, in cross-examination he conceded that none of the three employees in question had ever before been to his home and that although other employees had paid social calls, no one had ever come at such a late hour. Mr. Huncar became rather evasive during cross-examination when questioned about the substance of his discussions with the three employees on the evening in question. He was only prepared to indicate that it was “anti-union — the same old thing.” He suggested to the Board that he was not particularly interested in the views of those employees or in their proposed activities. However, in view of all the circumstances including Mr. Huncar’s encouragement and approval of the meeting arranged by Mr. Macaulay at the Wandlyn that day, and the fact that the employees remained at his home for “a couple of hours”, that testimony is simply not credible. None of the employees who attended at Mr. Huncar’s home that evening testified before the Board.

25. Mr. Huncar also indicated during cross-examination that he met with Messrs. Corrigan and Sturgeon “half a dozen times” in his office at the plant. He also conceded that he knew that Messrs. O’Hara, Corrigan and Sturgeon were “talking to employees in the plant during working hours.” Having regard to all of the evidence, the Board finds that this late night visit to Mr. Huncar’s home occurred on November 8, 1980, the day on which Messrs. Sturgeon and Corrigan had been “turned around” by Messrs. Macaulay and O’Hara. The Board further finds that Messrs. O’Hara, Sturgeon and Corrigan, met with Mr. Huncar frequently thereafter and that he encouraged them to pursue anti-union activities of the type hereinafter described.

26. On or about November 11th, Mr. Nicholls and Ms. Marier attended at Mr. Huncar’s office and met with him for “ten to fifteen minutes”. They advised him that the union was actively campaigning to organize the plant and warned him not to engage in any anti-union activities. Mr. Huncar responded that he was aware that the Company could not get involved in any anti-union campaign. Following that meeting, the organizers distributed the following letter (typed on union letterhead) to employees of the respondent:

“TO ALL EMPLOYEES OF ROBIN HOOD MULTIFOODS

Trenton, Ontario

Dear Sir and Madam:

As you are well aware, there is presently an organizing campaign being conducted at your plant which is progressing very favourably.

It has been brought to our attention that certain supervisory personnel have been interfering with our organizing campaign which is *DEFINITELY* contradictory to the *ONTARIO LABOUR LAWS*.

On Tuesday morning, November 11, 1980, we met with Mr. John Huncar and Mr. Keith Conklin from the Toronto office of Robin Hood Multifoods. We brought these complaints to the attention of your management. Your management has assured us that there will be no further interference on behalf of supervisory personnel in respect to your organizing campaign.

*CONTRARY TO THE RUMOURS THAT CERTAIN
SUPERVISORY PERSONNEL HAVE A LIST OF ALL
EMPLOYEES WHO HAVE SIGNED UNION CARDS. [sic]
THIS IS A POSITIVE LIE AND WE CHALLENGE
ANY PERSON IN MANAGEMENT CAPACITY TO SAY
THAT WE ARE LYING TO YOU.*

In view that there may be a change of companies, *IT IS IMPERATIVE THAT YOU PROTECT YOUR RIGHTS*, by having Union representation. As with a new employer, you have no say and could lose all your seniority, benefits, and your jobs without Union representation. [sic] We urge you to sign your Union card *NOW*—if you have not already done so, so we can protect your rights under the Labour Relations Act.

Fraternally yours,

(signed) Jack Nicholls
General Organizer

(signed) Phylis Marier
Organizer"

27. Shortly after that letter was circulated, Mr. Huncar, who had retained counsel "just after the union's first letter" (dated November 7), was advised by counsel not to meet with employees about anything other than Company business.

28. On or about November 12th, the respondent distributed the following letter (on company letterhead) to employees with their paycheques, in response to the union letter of November 11th:

"Some of your fellow employees have approached the company concerning attempts by a Union to represent the employees of our plant. The company considers this an important matter and we hope that you will take the time to read this letter now.

First of all you are completely protected by law to act freely in rejecting or accepting the Union as you legal representatives. The choice is for you and your fellow employees to make. I want to emphasize that the Company has never and will never interfere with your rights as an employee.

There are certain things we think you should know about an organizing campaign and in particular the signing of a membership card.

Signing a membership card means that you are prepared to take on new obligations. Many of these obligations, such as Union dues and initiation fees, are contained in the Union's constitution. We suggest that you get a copy of the Union's constitution from Mr. Jack Nicholls and read it

carefully before you sign a membership card. You should know what your obligations are before signing a membership card.

The signing of a membership card is an important matter. If more than 55% of the eligible employees sign a membership card, the Ontario Labour Relations Board could automatically certify the Union as your legal representative without a secret ballot vote. For example, if there are 100 eligible employees and 56 sign a membership card, the O.L.R.B. could automatically certify the Union. But all 100 eligible employees, whether they sign a membership card or not would have the Union as their legal representative and be required to pay Union dues.

Thank you for taking the time to read this letter and we will keep you informed of any new developments.

Yours truly,

(signed)
John Huncar"

29. During November, Mr. Sturgeon was employed by the respondent as a porter. It is the responsibility of a porter to provide the persons working on the line which he is portering, with the supplies they need to run the line. The evidence indicates that during November, Mr. Sturgeon frequently left the line for which he was the porter and went to talk to people on other lines for ten to fifteen minutes at a time. Although a porter's job requires that he leave the line from time to time to get supplies, Mr. Sturgeon's absences from the line during the period in question were lengthier and more frequent than normal. His recurring absences from the line regularly resulted in the necessity of paging him over the loud-speakers in the plant and in the cafeteria when a worker's supply of the products necessary to run the line became depleted. His extended absences from his line must have been apparent to supervisor Gloria Lajoie and foreman Robert Macaulay, who are generally in the plant during Mr. Sturgeon's shift. Christine Lemire, an employee on the pizza line, provided the Board with some information concerning Mr. Sturgeon's activities during November. It was her evidence that Mr. Sturgeon approached her while she was working on the "pizza line" and gave her a copy of the slip of paper (which he had received from Mr. Macaulay at the Wandlyn on November 8th) with an address to which she could write to get her union card back. Mr. Sturgeon told her that "Mr. Huncar knew all the people who had signed a union card." He subsequently approached her on the line on several occasions and attempted to persuade her to sign a petition against the union. He told her again that "Mr. Huncar knew everybody who had signed a union card." When she ultimately told him that she did not want to sign a petition against the union, he told her that she "would be sorry". Stephen Fox, an employee who works in the respondent's bakery section, testified that he observed Mr. Sturgeon walk down the "pie line" (located beside the "french bread line" which Mr. Sturgeon was portering) with a petition in his hand. It was Mr. Fox's uncontradicted evidence that Mr. Sturgeon "walked all the way down the pie line and talked to every woman, then he moved to the next line." It was also his uncontradicted evidence that supervisor Gloria Lajoie was "around" at the time. (Ms. Lajoie was not called at a witness, nor was Mr. Sturgeon.) He further testified that on a number of occasions, he saw Mr. Sturgeon "away from the [line on which he was the porter] and wandering through the other lines talking to other people."

30. The respondent produced from Mr. Sturgeon's personnel file written "reports" with respect to warnings given by foremen to Mr. Sturgeon on August 21, 1980 and October 1, 1980 for being absent from the line while it was running. Although that documentation indicates that Mr. Sturgeon was told to "improve or else", the evidence also indicates that Mr. Sturgeon was promoted to the classification "Utility 2" and received an increase of pay on November 27th of \$.36 per hour because he was "doing a more responsible job." In his new position, Mr. Sturgeon had "much mobility in the plant" since his job duties required him to be constantly on the move throughout the plant. Although Mr. Huncar denied that this constituted a promotion, his evidence was again contradicted by that of Mr. Macaulay, who testified that he "got Mr. Huncar's approval before he (Mr. Macaulay) promoted Mr. Sturgeon." In the circumstances, the Board finds that Mr. Sturgeon was promoted at least in part as a reward for his anti-union activities and that the message implicit in the promotion, namely, that anti-union employees are rewarded by the Company, would not likely have escaped the other employees in the plant.

31. On or about November 11, Pat Corrigan approached Stephen Fox, and asked him to set up a meeting at which employees could speak with Mr. Nicholls and Ms. Marier. Mr. Corrigan told Mr. Fox that he was uncertain about the union and that he and many other employees would like to ask them some questions. As a result of Mr. Corrigan's request, Mr. Fox spoke with Mr. Nicholls and Ms. Marier who arranged for a meeting to be held at the Wandlyn on November 18th for the benefit of all employees who had questions to be asked about the union. Mr. Fox then advised Mr. Corrigan of the date, time and place of the meeting. Other employees were told of the meeting "by word of mouth".

32. On November 12th, Mr. Huncar met with all employees (through three meetings, one for each shift). It was his evidence that he called the meetings because "a lot of employees had been approaching [him] in the plant about a lot of concerns about the union letter dated November 11th." He advised employees that if the plant was sold, neither the applicant nor the respondent could protect their rights during the transition period since only a government agency "had any say in matters during the transition period." He again emphasized what had happened at the Ohio plant that was purchased by Nestles. He also commented that during the transition period, "there would be business as usual at the plant" and indicated that he would remain the Plant Manger in the event of a sale to Nestles.

33. On the morning of November 18th, Mr. Macaulay approached Mr. Gozzard at the end of the latter's shift and told him that there was going to be a union meeting that afternoon at the Wandlyn. Mr. Macaulay asked him if he was doing anything that afternoon and when he replied in the negative, Mr. Macaulay said that he would like to know who attended those meetings. Mr. Gozzard's testimony concerning his instructions from Mr. Macaulay was:

"He (Mr. Macaulay) said he wanted me to "bird dog" the area. He asked me to come over to sit in the parking lot or somewhere else to see who went in. He said not to come in my own car — use another car — borrow one from a friend or rent one. He said he would reimburse me for my time and vehicle, if necessary. He told me to take note of the people who went to the meeting — take a list of the people who work at Robin Hood who went to the Wandlyn."

Mr. Macaulay informed the Board that Mr. Huncar was the one who wanted to know who

was involved in the union meeting. Mr. Macaulay testified: "That's why I took the stance with Gozzard [of offering to reimburse him], because Mr. Huncar wanted to know." He also stated that Mr. Huncar told him: "If anybody is out any money we'll see what we can do."

34. Pursuant to Mr. Macaulay's instructions, Mr. Gozzard borrowed his brother's van and stationed himself in it for "between two and three hours" in the Wandlyn parking lot. When he saw Messrs. O'Hara, Corrigan and Sturgeon enter the Wandlyn after 2:00 p.m., he decided to go in and see what was going on. After having "a couple of beers" in the bar, they decided to go to the second union meeting scheduled to be held that afternoon, with the intention of disrupting it and discrediting the union in front of the other employees in accordance with Mr. O'Hara's suggestion that they "go upstairs and make them (the union organizers) look like a bunch of ass holes." Approximately twenty employees of the respondent were in attendance at that meeting at which Messrs. Sturgeon and Corrigan (and, to a lesser extent, Messrs. O'Hara and Gozzard) spoke so much that other persons had little or no opportunity to speak. Debbie Kearns, an employee who was one of the union organizers, testified that "some of the older women (from the day shift) would try to ask a question but Ross and them (Messrs. O'Hara, Sturgeon and Corrigan) would butt in; they wouldn't give the others a chance to ask questions or give Jack (Nicholls) or Phylis (Marier) a chance to answer." Although there is no direct evidence that management directed Messrs. O'Hara, Sturgeon and Corrigan to engage in this activity, it is reasonable inference in the circumstances of this case that the employees in question could not have engaged in such conduct but for the continuing encouragement which they received from Mr. Macaulay and Mr. Huncar with respect to their anti-union activities.

35. One evening while Mr. Gozzard was in the plant cafeteria checking the production sheets between 11:00 p.m. and midnight, Mr. Huncar gave him an article from the November 17, 1980, edition of the "Trentonian and tri-County news" and instructed him to post it on the bulletin board. That article headlined "Bata Strike — Two officers hurt in near riot scene", reads in part as follows:

"A confrontation Friday at the Bata Warehouse on Carrying Place Road, between striking Bata Footwear employees and five trucks that tried to cross picket lines, sent two Trenton policemen to hospital and resulted in 10 people being charged.

About 150 hostile strikers hurled rocks and other objects at the trucks as they tried to cross the lines Friday afternoon, causing an unestimated amount of damage to the transports and other vehicles. The rear window of an OPP cruiser was also smashed, as 17 Trenton Police force officers and nine policemen from the Belleville detachment of the OPP tried to bring the crowd under control.

The five trucks, with the assistance of the police, crossed into the Bata Warehouse property, were loaded and brought back out.

Const. Clare Dainard was taken to Trenton Memorial Hospital suffering head injuries and was kept overnight for observation. He was released from the hospital Saturday. Const. Randy Barre was treated for a

fracture to his right hand was later released. Both policemen will be off work for some time.

The police are also investigating fire bombs which were thrown at the transports. As a result of the investigation by the city police and OPP, eight people have been charged with mischief."

[The article described further charges (for common assault and arson) which resulted from "an investigation into the burning of Hydro transformers at the Bata Warehouse around midnight." It also described the calling of a boycott of Bata Footwear products as a result of the strike of more than 1,000 Bata employees "who are members of the U F C W (United Food and Commercial Workers International Union), Footwear Division".]

Under vigorous cross-examination, Mr. Huncar ultimately conceded that the act of giving Mr. Gozzard such a clipping to put on the bulletin board was "probably a concurrence with what Mr. Gozzard was doing." On another occasion, Ellie Martin, a lead hand on the evening shift, called Mr. Gozzard into the front office and asked him to post two articles about the Bata strike "from Mr. Huncar", one of which was about "the head of the Bata union being fired."

36. During a meeting with Mr. Huncar between November 8th and 18th, Mr. Gozzard was told that if anyone ever asked him whose idea it was for him to disrupt the union, to tell them that it was his own idea since if anyone ever found out that he (Mr. Huncar) had anything to do with it, the union "would be in like that." (Mr. Huncar snapped his fingers as he spoke the final word.)

37. Following the meeting on November 18th, Mr. Gozzard began to lose interest in discrediting the union. His explanation to the Board for this change in attitude was: "I was to the point where I was getting fed up with the whole deal — people spreading rumours about people and signed cards ... it got a little monotonous." Accordingly, when Mr. Macaulay asked him who had attended the union meeting, he said: "I don't think it is necessary for me to say because Keith, Pat and Roger were there. They can tell you as well as I." Mr. Gozzard's evidence concerning his attitude after November 18th was as follows:

"I just let it ride. People were turned away from talking or associating with me. I lost interest in trying to discredit the union. I never signed a card at that time myself but I never told anyone not to."

Although Mr. Gozzard was no longer included in discussions concerning anti-union activities, he noted that Messrs. O'Hara, Sturgeon and Corrigan continued to spend an inordinate amount of time in Mr. Macaulay's office "with the door closed."

38. In late November, Messrs. O'Hara, Sturgeon and Corrigan again attended at Mr. Huncar's home and remained there "for a couple of hours." Mr. Huncar displayed a rather convenient memory under cross-examination concerning the discussions which occurred at this meeting. However, he did reveal that Mr. Corrigan dominated the majority of the meetings and talked about "tactics". He also conceded that the employees in question were

“looking for attention from him” and “possibly some form of relationship and approval.” Mr. Huncar also told the Board: “I told him (Mr. Corrigan) that how he conducted himself was his own business.”

39. On December 2nd, a meeting was held at the Wandlyn after the evening shift. Donna Hand, the lead hand on the pizza line, advised Debbie Kearns that Roger Corrigan had told her that there were “free drinks” at the Wandlyn. Between 20 and 25 employees went to the Wandlyn and took the “free drinks” which they obtained in the lounge to a meeting room downstairs. Messrs. O’Hara, Corrigan and Sturgeon were seated at a table at the front of the room along with Paul Robertson, a former cook who had been promoted to what Mr. Huncar described as the “key role of the lead hand” in November. They asked why employees thought they needed a union. Pat Corrigan (or one of the other three persons at the table) stated that if the union “got in”, the employees would lose the uniforms that were provided by the Company and would have to start buying their own. Mr. Corrigan also asked who had signed for the union. At a time when nearly everyone else had left the meeting, Mr. O’Hara said to Ms. Kearns, who “stuck up for the union” at the meeting, and another employee, Debbie Lloyd: “If you have problems, why don’t you go talk to John Huncar.” Ms. Kearns then told him that she would talk to Mr. Huncar. The next day, Mr. O’Hara approached Ms. Kearns when she came in to work and asked her if she would still go in to see Mr. Huncar. She indicated that she would. Donna Hand subsequently escorted her to Mr. Huncar’s office, where she (Ms. Kearns) met with Mr. Huncar in the presence of Mr. O’Hara and Ms. Lloyd, and talked about “things that bothered the women.” Mr. Huncar wrote down the points that were raised and said that he would like people to feel free to come in and see him at any time and talk over their problems with him.

40. It was Mr. Huncar’s evidence in chief that he was unaware of the December 2nd meeting at the Wandlyn until he was made aware of it on December 3rd by Messrs. Corrigan and Sturgeon. He testified that they came to his office the next day and told him about the meeting; he told the Board: “They told me they had, I believe, a reasonable turnout — the same old usual thing that Corrigan told me right from the first meeting. There was nothing new that he really expressed to me — same old thing.” However, during cross-examination he contradicted his earlier evidence by stating: “I believe I knew about the (December 2nd) meeting before, yes. I remember getting a phone call at 11:00 at night. O’Hara phoned me and told me that Corrigan had phoned the plant and said that they would be at the Wandlyn and if anyone wanted to express their views of the union, they could be there.” When asked if Mr. O’Hara told him that there were going to be free drinks for everyone, he answered: “He might have.” He also conceded that Mr. O’Hara “might” have been calling to ask for his (Mr. Huncar’s) approval concerning that meeting. A further vivid example of the contradictory evidence given by Mr. Huncar is the following testimony during cross-examination with respect to the information which Messrs. Sturgeon and Corrigan provided him on the day after the meeting:

“Question: Did they tell you who exactly was there?

Answer: They said they had twenty to thirty people. I didn’t ask for specifics at all.

Question: You knew that Debbie Kearns was there?

Answer: Yes, I probably knew that a few others were there too. They could have told me who was there — it’s possible.”

41. During re-examination, Mr. Huncar disclosed for the first time that Mr. O'Hara approached him after the December 2nd meeting and said that he had "spent the rest of [his] wife's Christmas present" buying drinks for employees at the meeting at the Wandlyn. Mr. Huncar then asked him if "he was looking to borrow some money." When Mr. O'Hara replied that "it would help", Mr. Huncar "loaned" him about \$75 which, according to Mr. Huncar was repaid in February of 1981. During re-examination, Mr. Huncar also told the Board that when Mr. O'Hara called him at home at approximately 11:00 p.m. before the meeting on December 2nd, "he (Mr. O'Hara) expressed to me that he was financially distressed." He further testified: "I asked him if he was looking for a loan. He intimated to me that yes (he was). He told me that he was spending or spent his wife's Christmas present."

42. On December 3rd and 4th, Mr. Huncar met with the part-time employees on each shift to assure them that the respondent would ensure that all part-time employees, with the possible exception of those who had been recently hired, would be assigned sufficient work to entitled them to receive holiday pay for Christmas day, Boxing day, New Year's day and the two other holidays (which he described as "floaters"). He stated at the meeting in response to a question from an employee that he was not in favour of third party interference to represent employees at the plant and did not see how a union could do anything for employees which he had not done during his years with the Company. He also undertook to take immediate action with respect to several matters of concern to part-time employees, such as new uniforms, slippery areas on the plant floor, the need for emergency "crash buttons" on the line, and the need for an aisle for racks. Some of those matters had been raised at previous meetings without any tangible results. Questions were also raised about the possibility of the respondent enrolling part-time employees in the credit union and paying O.H.I.P. premiums of their behalf.

43. The respondent's largest customer was "National Sea", whose contract constituted about one-third of the respondent's total production. Mr. Huncar testified (during examination in chief) that the respondent was informed "in November or December" of 1980 that it would no longer be packing for National Sea once it had completed the existing "quota". However, during cross-examination he stated that the respondent was "officially notified sometime in September" of the loss of the National Sea contract. At his meetings with part-time employees on December 3rd and 4th, Mr. Huncar stated that there would be no lay-offs despite the loss of that contract because the purchase of the plant by Nestles should created more work. Mr. Huncar had given similar assurances to full-time employees at meetings on November 5th and November 12th. It was his evidence that although he "felt that there were going to be some lay-offs", he waited until the first week in January to tell the employees because he "didn't want to tell the employees before Christmas." It was also his evidence that he hoped to obtain additional orders to avoid having to lay-off employees.

44. On December 5th, Mr. Gozzard's careless failure to insure that he was delivering the proper rack of dry ingredients to the cooking kettles resulted in the wrong spices being added to the batch of gravy. When he discovered his "stupid mistake" an hour or two later, Mr. Gozzard after conferring with other non-managerial employees but without consulting with any member of management, concluded that the error was "minimal" and, therefore, decided to "just let it go through the lines." The error was subsequently detected in a taste panel. As a result, the finished products which contained the gravy in question were rendered unfit for delivery and had to be sold at a reduced price to employees at a substantial loss to the respondent. Mr. Gozzard was subsequently discharged on December 8th. The evidence

indicates that if Mr. Gozzard had reported his mistake to management before the gravy had been used as an ingredient in beef pies, the potential loss would have been only about \$500 instead of more than \$9,000.

45. The applicant alleges that Mr. Gozzard was discharged because he refused to engage in further anti-union activities after November 18, 1980. In the circumstances of this case, we are of the view that it is unnecessary to decide whether or not the decision to discharge Mr. Gozzard was tainted by anti-union animus. Mr. Gozzard was reinstated to his former position one week later as a result of interventions on his behalf by other members of management who asked Mr. Huncar to reconsider his decision to discharge Mr. Gozzard in view of the fact that he was a conscientious, hard working employee. Thus, Mr. Gozzard in effect received a one week suspension without pay. We are satisfied that Mr. Gozzard would have lost the equivalent of at least one week's pay through a suspension or demotion by the respondent for his serious error regardless of any considerations with respect to his involvement in activities in support of or against the union. Thus, even if we were of the view that Mr. Gozzard was discharged contrary to the Act, we would not in the circumstances of this case exercise our discretion under section 79 to order that the respondent reimburse him for the loss of one week's wages which we are satisfied would have occurred in any event. Moreover, the discharge (or suspension) of Mr. Gozzard would not have had a chilling effect on the organizational activities of the applicant since, in the eyes of the employees of the respondent, it would be seen as the discharge (or suspension) not of a union supporter, but rather of an employee who was opposed to the union. Although Mr. Gozzard ceased to express opposition to the applicant after November 18th, there is no evidence that he engaged in any pro-union activity prior to his discharge. He did not sign a union card until four days after his discharge, and it was not until that day (December 12th) that he advised the union of the anti-union activities which formed much of the subject matter of the present case.

46. Part-time employee Margaret Barriage testified that rumours were circulating in the plant that if the union was certified, the hours worked by part-time employees would be reduced. It was her evidence that the rumour in question was "kind of all over the plant that night." She described the effect of the rumour as follows: "Everybody was starting to panic who had signed the union card. Even I was." Josephine Nemec, another part-time employee, testified that lead hand Ellie Martin came over to her while she was working and told her that according to union regulations, part-time employees can only work eighteen hours per week. Thus, Ms. Nemec, a "part-time" employee who had been working about thirty-two hours per week, was led by Ms. Martin to believe that if the applicant was certified, she would be reduced to eighteen hours per week. Ms. Nemec candidly advised the Board that a few minutes later, she spoke with one of the in-plant union organizers about the matter and was told that "it wasn't true." It was also her evidence that she "was satisfied with that answer." She advised the Board that she also spoke with Ms. Barriage about the matter that evening and that Ms. Barriage "didn't believe it" and "wasn't upset". There is no evidence that Ms. Martin made such statement to any other employees, nor that she was encouraged to do so by Mr. Huncar or by any of the foremen. In view of this evidential discrepancy and in the absence of evidence from any other employees concerning this "rumour", the Board is of the view that the applicant has not proved on the balance of probabilities its allegation that the respondent breached section 56 by spreading false rumours about the consequences for part-time employees in terms of their hours of work if the union was certified.

47. There was also evidence that a typewritten petition circulated by some employees in

the working area of the plant and in the cafeteria contained a statement to the effect that "those who had signed earlier for the union were no longer working for Robin Hood." At least one employee (Barbara Craig) interpreted this to be a threat by management that employees would "be fired if they signed anything for a union." However, there is no evidence that management originated or was even aware of the existence of that petition (which was clearly not one of the petitions circulated by Mr. O'Hara as his petitions are handwritten documents).

48. As a result of the loss of the National Sea contract, the respondent laid off 63 "part-time" employees in early January 1981. Employees to be laid off were selected on the basis of their seniority with the respondent and in accordance with the Company policy of laying-off no full-time employees until all "part-time" employees had first been laid off. Employees were not informed about the forthcoming lay-offs until January 5, 1981, when they were advised that because of the loss of the National Sea contract, the plant would be "returning to one shift" and that all "part-time" employees with less than three month's service would be laid off effective January 7, 1981, with a further lay-off of 44 part-time employees effective January 15, 1981.

49. As indicated above, the applicant contends that the respondent has contravened sections 56, 58 and 61 of the Act. In his written argument on behalf of the respondent, counsel conceded that "the involvement of a member of management at the November 8, 1980 meeting improperly interfered with the Applicant's attempts to organize the employees contrary to Section 56 of *The Labour Relations Act*." It was also "conceded by the Respondent that it improperly involved itself in Mr. Gozzard's attempts to monitor the attendance at the meetings [on November 18, 1980]."

50. Sections 56, 58(c) and 61 of the Act provide as follows:

"56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

58. No employer, employers' organization or person action on behalf of an employer or an employers' organization,

...

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

61. No person, trade union or employers' organization shall seek by

intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act."

51. Having regard to all of the evidence before it and the submissions of the parties, the Board finds that in addition to the aforementioned contraventions of the Act that were admitted by the respondent, the respondent through members of its management violated sections 56, 58(c) and 61 by:

- (1) recruiting Mr. Gozzard to engage in surveillance activities and to otherwise assist the respondent with its anti-union activities (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220, at paragraph 71, in which the Board stated that "surveillance activity can only have purposes of aiding an employer in 'interfering' with the selection of a trade union and in 'coercing' and 'restraining' employees from engaging in protected activity and, with these purposes, constitutes a *per se* violation of sections 56, 58 and 61 of *The Labour Relations Act*);
- (2) arranging for employees to meet with the respondent's most important foreman to discuss the union with a view to discrediting the union and "turning around" union supporters by indicating that certification of the union would result in the loss of existing fringe benefits;
- (3) causing or encouraging rumours to be spread among employees that management knew the names of everyone who had signed union cards.

The Board also finds that the respondent further contravened section 56 by:

- (1) using Mr. Gozzard to infiltrate the union to obtain information about it, including the names of the organizers;
- (2) granting Mr. Gozzard time off work for the purpose of meeting with a union organizer for the purpose of obtaining further information for the respondent about the union organizing campaign;
- (3) authorizing Mr. Gozzard to extend his breaks and take extra breaks in order to discuss the union with other employees;
- (4) expanding Mr. Gozzard's hours of work for purposes which included providing him with greater access to employees in order to better effectuate his anti-union activities and as a financial reward therefor;
- (5) directing Mr. Gozzard to post on the Company bulletin board inflammatory newspapers clippings which related to a local strike that involved an unusual degree of violence and property damage;

- (6) encouraging Mr. O'Hara to pursue anti-union activities including the circulation an anti-union petition and the holding of a meeting of employees for the purpose of discouraging support for the union, at which meeting free drinks were provided with the financial assistance of the respondent;
- (7) openly encouraging employees directly and through lead hands to sign anti-union petitions which were being circulated in the plant by Mr. O'Hara, a senior lead hand who would reasonably be perceived by employees as being a member of management or as being in closer proximity to managerial authority than other employees since he was the normal conduit between employees and Mr. Macaulay, the most important foreman in the plant;
- (8) attempting to interfere with the union organizing campaign by conducting a series of individual interviews in such circumstances that the employees who were interviewed and the other employees in the plant who would doubtlessly become aware of the interviews, would reasonably perceive the interviews to be related to the union organizing campaign, and during which a least one employee was directly questioned concerning union activities in the plant;
- (9) directly and indirectly (through other employees) encouraging employees to write to the union to request the return of their membership cards;
- (10) encouraging and supporting extensive anti-union activities by Messrs. Sturgeon and Corrigan; and
- (11) promoting Mr. Sturgeon to reward him for his anti-union activities and to facilitate such activities.

52. The applicant also contended that the respondent violated the Act by making a deliberate decision not to lay-off employees until after the terminal date of the application in order to make the union's organizing effort more difficult. However, the Board is satisfied on the evidence before it that the timing of the lay-off was decided exclusively on the basis of production requirements and was not in any way influenced by anti-union considerations. Similarly, we are of the view that the employer did not violate the Act by refraining from advising employees prior to the terminal date of the possibility of an extensive lay-off of "part-time" employees in January. The evidence indicates that the respondent did not in December have a definite plan to lay-off employees as it was engaged in a search for additional orders to avoid the need for a lay-off. Moreover, as contended by counsel for the respondent, if the respondent had announced to employees prior to the terminal date the possibility of a lay-off, it might well have been accused of threatening the economic well-being of the employees by making such an announcement during the organizing campaign.

53. In support of its application for certification without a vote pursuant to section 7a of the Act, the applicant contended, *inter alia*, that "there has never been a case . . . with such substantial employer interference over such a prolonged period including myriad threats to

job security, substantial promises, general interference and disruption of the union including infiltration and disruption of the union where the Board has refused to exercise its discretion under section 7a and to certify the union.” In his submissions, counsel emphasized the lengths to which the respondent went to convince the employees that the secrecy of the membership evidence could not be relied upon and that the employer knew who had signed union cards and who had not. He also submitted that the true wishes of the employees could not be ascertained by a vote in view of the extensive employer support of the anti-union petition. It was his contention that the employer deliberately set out to polarize the work force and that it had accomplished its purpose to such an extent that certification under section 7a is warranted because the employer’s conduct cannot be erased and the *status quo ante* cannot be restored. The applicant also contended that in addition to certification under section 7a, the Board should make substantial remedial orders including directions that notices be posted by the employer and mailed by the employer to the home of each employee, the union be allowed substantial opportunities to meet with employees on Company premises during working hours, the union be given an up-to-date list of employees with their addresses and telephone numbers, the employer refrain from engaging in future violations of the Act, Mr. Gozzard be compensated for the loss of a week’s pay, and the union be compensated for additional organizing and legal costs which were made necessary by the employer’s wrongful violations of the Act.

54. It was submitted on behalf of the respondent that the applicant ought not to be certified under section 7a because:

- (1) the respondent had gone to great lengths in its communications with employees not to threaten the job security or economic well-being of the employees;
- (2) The Board’s conducting of several of the days of hearing of this matter in Trenton had generated employee confidence in the Board’s procedures by permitting them to observe the Board “taking charge” of the situation and administering justice;
- (3) the passage of a substantial period of time since the application was filed on December 18, 1980 has allowed for the development of a proper setting for the holding of a secret ballot vote;
- (4) The Board’s effective procedure for the holding of a representation vote, which is particularly effective in a large bargaining unit, should make it reluctant to exercise its extraordinary powers under section 7a of the Act; and
- (5) the rights of the employees in this matter must be respected in this situation in which the union’s organizing campaign was ‘floundering’ by November of 1980, prior to any employer illegalities.

Thus, the respondent submitted that the Board should order a secret ballot vote and indicated that the respondent would endorse the ordering of the following “safeguards” in connection with such vote:

- “1. Notices — an order directing the Respondent to post notices at the plant and to send notices to the homes of the employees advising them of the violation of *The Labour Relations Act* and the Respondent’s undertaking to abide by the provisions of *The Labour Relations Act* in the future.
2. Meeting — An order requiring the Respondent to allow the Applicant time during working hours on the Respondent’s premises to address the employees concerning the organizing campaign by the Applicant.
3. Lists — An order requiring the Respondent to supply the Applicant with current lists of the names, addresses and telephone numbers of all employees.
4. Letter — An order directing the parties to formulate and jointly sign a letter to all employees outlining the procedure surrounding a secret ballot vote conducted by the officials of the Board.”

55. Counsel for the respondent urged the Board to assess the respondent’s actions in the context of the “reality” of the high level of communication at the plant between employees and management, which had been supported and encouraged by Mr. Huncar throughout his period as Plant Manager. The evidence indicates that prior to any organizational activities, Mr. Huncar had emphasized communication with employees through employee meetings, his regular inspection and communication “tours” of the plant, and his “open door” policy with respect to employees. Although efforts to foster such communication may be quite laudable in the interest of sound personnel practices and employment relationships, they cannot be used by an employer to interfere with the selection of a trade union by employees or the exercise of the right of each employee to join a trade union of his or her own choice and to participate in its lawful activities. The Board is of the view that in the circumstances of the present case, the respondent has attempted to use its “open door” policy and emphasis upon communication, to disguise its violations of the Act. Similarly, the Board views with scepticism the lofty statements concerning employee rights contained in Mr. Huncar’s letter to employees in view of the extensive pattern of unfair labour practices orchestrated by himself and the members of management reporting to him.

56. Section 7a of the Act provides as follows:

“Where an employer or employers’ organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers’ organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

As has been noted by the Board in many cases, certification can be granted under that section only if three conditions are satisfied:

- (1) The respondent must have contravened the Act.
- (2) The contravention must have resulted in a situation in which the true wishes of the employees are not likely to be ascertained by a secret ballot vote.
- (3) The applicant must have membership support (in the appropriate bargaining unit) that, in the opinion of the Board, is adequate for the purposes of collective bargaining.

57. As noted earlier in this decision, the respondent has conceded that it has contravened the Act. Moreover, the Board has found a substantial number of other violations of the Act by the respondent.

58. It is implicit in condition (2) set forth above, that not every contravention of the Act will provide a basis for certification under section 7a. As stated by the Board in *Radio Shack*, [1980] OLRB Rep. Mar. 248, at paragraph 27:

“Certification under section 7a of the Act is an extraordinary process which is not applied by the Board in response to all employer violations of the Act during the course of a union’s organizing campaign. The Board is given broad remedial authority to rectify breaches of the Act and accepts that in most situations employees feel protected by the rule of law established under the Act so that they are not unduly influenced when making a secret ballot choice by employer violations of the Act which do not constitute direct threats to the employee’s job security or promise of general economic advantage dependent upon whether or not a union is certified. . . .”

59. The origin and purpose of section 7a was elaborated by the Board in *Ex-Cell-O Wildex, Canada*, [1977] OLRB Rep. June 370:

“14. Certification without a vote under section 7a was designed as both a deterrent to illegal employer interference in union organizational campaigns, and as a device to provide a meaningful and effective remedy in those cases where the employer’s interference operated to destroy the free selection process guaranteed by section 3 of the Act. Prior to the 1975 amendments to the Act, a union seeking to have section 7(4), the predecessor to section 7a, invoked was required to have filed membership evidence on behalf of at least fifty per cent of the employees in the bargaining unit. In recognition of the fact that employer interference often occurs early in an applicant’s organizing campaign, and before a majority has been obtained, the fifty per cent membership requirement was removed by the 1975 amendments.

. . .

16. As the Board pointed out in *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714, the effect of applying section 7a is to take an application out of the normal certification process. Ordinarily, a union,

in order to obtain automatic or outright certification under *The Labour Relations Act*, must exhibit unqualified support from at least fifty-five per cent of the employees in the appropriate bargaining unit. The fifty-five per cent requirement reflects the belief that there must be some margin for error; and that therefore; something more than a simple majority is necessary to ensure that the bargaining agent has a true mandate. Where, as here, an applicant union does not obtain the membership percentage required to qualify for outright certification, but enjoys the support of at least forty-five per cent of the bargaining unit employees, the Board will normally order a representation vote. In order to be certified after a vote, an applicant must obtain at least fifty per cent of the votes cast.

17. Section 7a allows the Board to certify a trade union as bargaining agent without the membership percentage usually required for outright certification. It is not suprising, then, that the Legislature has placed a number of legal restrictions on its use. As the wording of the section makes clear, it is not enough that the employer has engaged in conduct prohibited by *The Labour Relations Act*. This conduct must have resulted in a situation where the true wishes of the employees are not likely to be ascertained from the results of a representation vote. As well, the trade union must, in the opinion of the Board, have membership support adequate for the purposes of collective bargaining in the union found appropriate by the Board.

18. The logic of these requirements is clear enough. The premises of the Act's certification procedures is that collective bargaining is to be afforded only when it is the choice of the majority. Accordingly, the grant of automatic certification to a trade union, in the absence of documented evidence of majority support, should only be permitted where the true wishes of the employees are not likely to be ascertained through the normal procedures and where the union has sufficient support among the employees in the unit to bargain collectively with the employer.

19. The Board has indicated, quite clearly, that certification without a vote under section 7a is not an automatic response to every unfair labour practice which occurs in the pre-certification period, and that an applicant must establish substantial employer interference in the certification process to secure a determination that 'the true wishes of the employees — are not likely to be ascertained'. (See, for example, *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250.) In this regard, a distinction has been drawn between the criteria used to determine whether a statement of desire (or petition) in opposition to an application for certification reflects the true wishes of the employees who signed it and the criteria used to determine whether the true wishes of the employees are not likely to be ascertained from the results of a representation vote, which is conducted under the supervision of the Board, and by secret ballot. As the Board stated in *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956, if an employee logically suspects

that his employer will become aware of his signing or his refusal to sign a petition, this can effectively thwart his free expression as represented by his signature. For this reason, very little in the way of employer interference, in the surrounding circumstances, need be shown for the Board to conclude that a petition does not represent a true change of mind by the employees who signed it such that it should cause the Board to exercise its discretion to order a vote. The situation is quite different on a representation vote, however, where the employees can usually rest assured that their choice will not be revealed to their employer, and therefore, the Board requires evidence of intimidation or coercion such that the secrecy of the ballot cannot be relied upon to ensure a free expression of employee views.

20. In *Winson (supra)*, the Board offered this example of the kind of intimidatory or coercive activity on the part of an employer which would, by its very nature, be likely to conceal the true wishes of an employee on a secret ballot:

‘No general rules can be set down as to what circumstances might justify a conclusion that employee desires are not likely to be ascertained in a representation vote. Rather, each case must be decided on its own particular facts. In some instances the actions of an employer may be such that a determination that a vote would not be reflective of employee desires may be very easily arrived at. For example, a warning to employees that the certification of a trade union would result in lay-offs and shorter working hours would, lacking any other considerations, tend to have such an intimidating effect that employees might reasonably be expected to refrain from voting for the union no matter what their true feelings about being represented by it. . . In such a situation to vote in favour of being represented by the trade union might well appear to employees to be tantamount to voting themselves either out of a job or, at best, a drop in pay.’”

Section 7a is not regarded by the Board to be a form of “punishment” against an employer; rather, its purpose is to ensure that an employer does not benefit from its own wrongdoings. (See *Dylex Limited*, [1977] OLRB Rep. June 357, at paragraph 25, application for judicial review dismissed, (1977), 81 D.L.R. (3d) 554.)

60. As noted above, Mr. Macaulay, the respondent’s “most important foreman”, “backed up” the statement by his senior lead hand and “right hand man” that if the union was certified, the respondent would take away all existing employee benefits. Mr. Macaulay’s question to Messrs. Sturgeon and Corrigan concerning how many years they thought it would take to get all of those benefits back appears to have been most instrumental in turning those employees, who up to that point in time had been union supporters, into active opponents of the union. It is reasonable to infer that they carried that message to many other employees in their attempts to get them to revoke their membership cards, and that Mr. O’Hara used a similar message to persuade employees to sign his anti-union petition. The use of this form of threat involving undue influence and intimidation concerning a matter relating to the

continued economic well-being of the employees is the type of wrongdoing that has an effect that cannot be erased and that may well leave employees with a lingering disquieting notion that voting for the union will be tantamount to voting for an adverse change in terms and conditions of employment. (See *Research Foods (1976) Limited*, [1981] OLRB Rep. Mar. 309; *Dylex Limited, supra*; *Lorain Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734; and *Winson Construction Ltd.*, [1976] OLRB Rep. Nov. 714.) The respondent also openly rewarded anti-union activities through its promotion of Mr. Sturgeon. The message that opposition to the union is rewarded by management would not likely be lost on the employees and is unlikely to be eradicated from their minds by the passage of time or by the Board's "taking charge" of the situation. Furthermore the rumour fostered by management that the General Manager of the respondent knew the names of everyone who had signed a union card is a particularly pernicious and disconcerting type of rumour that could preclude employees from expressing their true wishes even in a secret ballot. An employee might well fear that the rumour was true and that it would accordingly be dangerous to vote for the union since the General Manager might assume that the employees who had signed cards were also the ones who voted for the union and might seek to surreptitiously penalize or discriminate against such persons in the event the union was certified.

61. The evidence establishes an extensive pattern of unfair labour practices involving a substantial and successful effort by the respondent to infiltrate the applicant trade union, conduct surveillance of its activities, and use employees to discredit and disrupt the applicant's organizational activities. In assessing the impact of such illegal activities upon employees, the Board must view them together and consider their cumulative effect (see *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60). Although some of the individual contraventions, had they occurred in isolation, might not have created an atmosphere in which the true wishes of the employees would not likely be ascertained by a secret ballot, the Board is of the view and so finds that the cumulative effect of the extensive and pervasive pattern of contraventions of the Act by the respondent in this case has created such an atmosphere. No doubt there were some employees who would have opposed the union voluntarily without any prompting from the employer. However, the preponderance of the evidence points to the conclusion that the respondent deprived and continues to deprive the workforce at its Trenton plant of the ability to choose freely in an atmosphere untainted by employer undue influence and interference, whether or not they wished to be represented by the applicant trade union.

62. The Board must next determine whether in its opinion the applicant has membership support adequate for collective bargaining in each of the two bargaining units described above. On the date of the application, there was 203 employees in bargaining unit #1 and 11 employees in bargaining unit #2. The applicant has filed valid membership evidence for 101 of the employees in bargaining unit #1 and 4 employees in bargaining unit #2. Although the objectors filed statements of desire containing a total of 122 names, 42 of which coincide with the names of those who signed membership cards, Mr. O'Hara, the representative of the objectors, elected not to testify or to adduce any evidence before the Board with respect to the origination and circulation of those documents. Moreover, the evidence set forth above indicates that management and persons whom employees would reasonably perceive to be members of management or to be in greater proximity to management than other employees, played a substantial role in obtaining signatures on those statements of desire. Accordingly, the Board finds that the statements of desire do not in any way weaken the employee support for certification of the applicant reflected by the membership cards which it has filed with the

Board. Furthermore, the Board does not place any reliance upon the change of heart evidenced by individuals such as Messrs. Corrigan and Sturgeon since the Board finds that their apparent change of heart resulted from the respondent's unlawful interference with the selection of those individuals of the applicant trade union, and from undue influence on the part of management.

63. In the opinion of the Board, the applicant's membership support of 49.5% in bargaining unit #1 is adequate for collective bargaining. The respondent became aware through Mr. Gozzard in September or October that over 40% of the employees had signed cards. It can be inferred that it was the information that the union would soon be in a position to apply for certification, which prompted management to intensify its anti-union activities. In the absence of employer interference in its organizing campaign, it is highly probable that the applicant would have been able to obtain the relatively small amount of additional support necessary to win a certification vote or to obtain "automatic certification".

64. Although the applicant's membership support in the part-time bargaining unit is only slightly over 35%, the fact that the applicant has membership support of almost 50% in the full-time bargaining unit gives it a strong presence in the work place generally. Accordingly, the 36.4% of the employees in the bargaining unit will not stand alone since they will gain considerable support from the union's presence among the full-time employees. (See *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. March 398, in which the Board, in forming its opinion that membership support of 29.6% in the owner-operators bargaining unit was adequate for collective bargaining within the meaning of section 7a, took into consideration the fact that the union's membership support of almost 50% in the driver's bargaining unit gave it "a strong presence in the work place generally".) Thus, it appears to the Board that the applicant has a core of support in bargaining unit #2 sufficient to negotiate with the employer.

65. For the foregoing reasons, the Board is of the opinion that the applicant has membership support adequate for the purposes of collective bargaining in each of the two bargaining units.

66. The Board therefore certifies the applicant, pursuant to the provisions of section 7a of the Act, as bargaining agent for the following bargaining units:

Bargaining unit #1: all employees of the respondent at Trenton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, quality control technicians, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

Bargaining unit #2: all employees of the respondent at Trenton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff, and quality control technicians.

67. As reflected in a number of recent decisions, the Board has recognized that the issuance of a certificate (or certificates) under section 7a may not suffice to place the applicant in the position that it would have been in if the respondent had not contravened the Act. This is particularly true where, as in the present case, the respondent has engaged in a pervasive pattern of flagrant violations of the Act. In such circumstances, it is appropriate for the Board to exercise its remedial jurisdiction under section 79 of the Act to attempt to establish conditions that will promote fuller employee participation with a view to producing more constructive bargaining. Failure to do so would risk consigning the section 7a certificates to a climate where a collective agreement will be difficult, if not impossible, to realize. (See, *K-Mart Canada Limited (Peterborough)*, *supra*.)

68. The Board therefore orders that Robin Hood Multi-Foods Inc.:

- (1) cease and desist from engaging in surveillance of employees activities in respect of union organization, encouraging employees to engage in anti-union activities and otherwise interfering with the selection of a trade union by its employees;
- (2) provide the applicant forthwith with a list of names and addresses of employees in each of the bargaining units, and keep the list updated on a monthly basis for one year or until the union has entered into a collective agreement (or collective agreements) with the respondent with respect of bargaining units #1 or #2, whichever shall first occur;
- (3) permit the applicant access to its Trenton plant during working hours for the purpose of convening a meeting on each shift to address employees in each of the bargaining units out of the presence of any member of management; the meetings shall be scheduled by the applicant so that each employee in each bargaining unit has an opportunity of attending one of them during his or her normal working hours; each meeting shall not exceed two hours in length;
- (4) provide the applicant for a period of one year from the date hereof, with reasonable access to all employee notice boards in its Trenton plant (and cafeteria) for the posting of union notices, bulletins and other union business literature, to allow the employees ready access to information from the applicant concerning all aspects of the employees' representation including collective bargaining with their employers;
- (5) post copies of the attached notice marked "Appendix", after being duly signed by its General Manager, in conspicuous places in its Trenton plant and cafeteria, where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days; reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced, or covered by any other material; reasonable physical access to the premises shall be given by the respondent to a representative of the

applicant so that the applicant can satisfy itself that this posting requirement is being complied with.

DECISION OF BOARD MEMBER J. A. RONSON:

The dissent of Board Member J.A. Ronson will issue at a later date.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS ARISING OUT OF THE EFFORTS OF SERVICE EMPLOYEES' INTERNATIONAL UNION LOCAL 183, A.F.L., C.I.O., C.L.C., TO BECOME THE COLLECTIVE BARGAINING AGENT FOR OUR EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY INTERFERING WITH THE RIGHTS OF OUR EMPLOYEES TO SELECT A BARGAINING AGENT OF THEIR CHOICE, AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES
OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS, IF
THEY WISH;

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS;

WE WILL NOT ENGAGE IN SURVEILLANCE OR OTHER ILLEGAL
ANTI-UNION ACTIVITIES;

WE WILL NOT ENCOURAGE ANY EMPLOYEE TO ENGAGE IN ANTI-UNION
ACTIVITIES;

WE WILL NOT PROMOTE OR OTHERWISE REWARD ANY EMPLOYEE
FOR ENGAGING IN ANTI-UNION ACTIVITIES;

WE WILL NOT INTERVIEW OR OTHERWISE QUESTION EMPLOYEES
CONCERNING UNION ACTIVITIES;

WE WILL NOT ALTER ANY RATE OF WAGES, FRINGE BENEFITS
OR ANY OTHER TERM OR CONDITION OF EMPLOYMENT EXCEPT
IN ACCORDANCE WITH THE PROVISIONS OF THE LABOUR
RELATIONS ACT.

- 2 -

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT;

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL PROVIDE LOCAL 183 FORTHWITH WITH A LIST OF THE NAMES AND ADDRESSES OF EMPLOYEES IN EACH OF THE BARGAINING UNITS SET FORTH BELOW, AND KEEP THE LIST UPDATED ON A MONTHLY BASIS FOR ONE YEAR OR UNTIL THE UNION HAS ENTERED INTO A COLLECTIVE AGREEMENT (OR COLLECTIVE AGREEMENTS) WITH THE RESPONDENT IN RESPECT OF THE BARGAINING UNITS, WHICHEVER SHALL FIRST OCCUR.

WE WILL PERMIT LOCAL 183 ACCESS TO OUR PLANT DURING WORKING HOURS FOR THE PURPOSE OF CONVENING A MEETING ON EACH SHIFT TO ADDRESS EMPLOYEES IN EACH OF THE BARGAINING UNITS OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT. THE MEETINGS SHALL BE SCHEDULED BY LOCAL 183 SO THAT EACH EMPLOYEE IN EACH BARGAINING UNIT HAS AN OPPORTUNITY OF ATTENDING ONE OF THEM DURING HIS OR HER WORKING HOURS. EACH MEETING SHALL NOT EXCEED 2 HOURS IN LENGTH.

WE WILL PROVIDE LOCAL 183 FOR A PERIOD OF ONE YEAR FROM THE DATE HEREOF, WITH REASONABLE ACCESS TO ALL EMPLOYEE NOTICE BOARDS IN OUR PLANT (AND CAFETERIA) FOR THE POSTING OF UNION NOTICES, BULLETINS AND OTHER UNION BUSINESS LITERATURE, TO ALLOW OUR EMPLOYEES READY ACCESS TO INFORMATION FROM LOCAL 183 CONCERNING ALL ASPECTS OF THEIR REPRESENTATION BY LOCAL 183 INCLUDING COLLECTIVE BARGAINING.

WE WILL, UPON BEING GIVEN WRITTEN NOTICE TO BARGAIN, BARGAIN IN GOOD FAITH WITH LOCAL 183 AS THE DULY CERTIFIED COLLECTIVE BARGAINING REPRESENTATIVE OF OUR EMPLOYEES IN THE BARGAINING UNITS DESCRIBED BELOW, AND WE WILL MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.

THE BARGAINING UNITS ARE:

BARGAINING UNIT #1: ALL EMPLOYEES OF THE RESPONDENT AT TRENTON, ONTARIO, SAVE AND EXCEPT FOREMEN, PERSONS ABOVE THE RANK OF FOREMAN, OFFICE AND SALES STAFF, QUALITY CONTROL TECHNICIANS, PERSONS REGULARLY EMPLOYED FOR NOT MORE THAN TWENTY-FOUR HOURS PER WEEK AND STUDENTS EMPLOYED DURING THE SCHOOL VACATION PERIOD.

BARGAINING UNIT #2: ALL EMPLOYEES OF THE RESPONDENT AT TRENTON, ONTARIO, REGULARLY EMPLOYED FOR NOT MORE THAN TWENTY-FOUR HOURS PER WEEK AND STUDENTS EMPLOYED DURING THE SCHOOL VACATION PERIOD, SAVE AND EXCEPT FOREMEN, PERSONS ABOVE THE RANK OF FOREMAN, OFFICE AND SALES STAFF, AND QUALITY CONTROL TECHNICIANS.

ROBIN HOOD MULTI-FOODS INC.,

PER: _____
GENERAL MANAGER

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0330-81-JD Toronto-Central Ontario Building and Construction Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Complainants, v. **Simcoe Mechanical Contracting Limited** and Christian Labour Association of Canada, Respondents, v. Mechanical Contractors Association of Toronto, Intervener #1, v. Mechanical Contractors Association of Ontario, Intervener #2

Construction Industry – Jurisdictional Dispute – Whether complainant union claiming work assignment entitled to bring complaint under section 81 – Whether assignment of work under collective agreement giving rise to section 81 complaint

BEFORE: D. E. Franks, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *A. M. Minsky, W. Howard and D. J. Johnson for the complainants; W. R. Herridge, Q. C., Elizabeth Forster and J. Adema for Christian Labour Association of Canada; Gary Graham, C. Settmers, C. Waunch and J. Franki for Simcoe Mechanical Contracting Limited; G. Grossman for Intervener #1 and #2.*

DECISION OF THE BOARD; July 8, 1981

1. This is a complaint filed under section 81 of *The Labour Relations Act* wherein the complainants, that is the Toronto-Central Ontario Building and Construction Trades Council (hereinafter referred to as the Toronto Building Trades Council) and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (hereinafter Simcoe Mechanical Contracting Limited (hereinafter called Simcoe) have assigned certain work to the Christian Labour Association of Canada (hereinafter referred to as CLAC).

2. Both of the respondents raised certain preliminary objections to the jurisdiction of the Board to deal with this matter under section 81(1) of the Act. The matter was put on for hearing and heard as a preliminary matter. The position of the respondents being that the facts as disclosed by the complaint do not, even if admitted, give the Board the jurisdiction under section 81(1) to entertain this complaint. The facts contained in the complaint are as follows:

“(a) The complainant, Toronto-Central Ontario Building and Construction Trades Council (“the Council”), is a council of trade unions having AFL-CIO building trades jurisdiction in Ontario Labour Relations Board geographic area no. 8 (“O.L.R.B. geographic area no. 8”) and central Ontario;

(b) The Complainant, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (“Local 46”) is the affiliated local union of the Council which has the requisite plumbing and pipefitting jurisdiction in O.L.R.B. geographic area no. 8;

(c) As a result of tenders called for the construction of the Project by the Town of Vaughan, a sealed tender was submitted by C.A. Smith Contracting Limited ("Smith"), a general contractor having collective agreements with the Council and its affiliated local unions. The said tender carried All Can Mechanical Company Limited, an employer bound to the Provincial Agreement between The Mechanical Contractors' Association Ontario and the Ontario Pipe Trades Council, to perform the Work at the Project;

(d) The Town of Vaughan requested that Smith delete the Work from its tender and on such revised basis, on November 4th, 1980 entered into a contract with Smith for all construction work at the Project save and except the work herein. On that date, the Town of Vaughan also entered into a contract with Simcoe for the Work notwithstanding that Simcoe does not have a collective agreement with the Council and/or any of its affiliated local unions including Local 46, but rather employs members of CLAC;

(e) In or about the first week of April, 1981, construction work commenced at the Project. On or about April 15th, 1981, Simcoe commenced the Work at the Project employing members of CLAC;

(f) By letter dated April 23rd, 1981, the Council and Local 46 requested an assignment of the Work at the Project to members of Local 46 rather than to members of CLAC. As of the date hereof, Simcoe continues to be engaged in the performance of the Work at the Project employing members of CLAC;"

At the hearing in this matter, counsel for the complainant tendered the letter of April 23, 1980, referred to in paragraph (f) above, that reads as follows:

"We have been informed that the Town of Vaughan has let the contract for the mechanical work at its municipal office expansion project to your firm.

This Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 ("Local 46"), which local union is the affiliated local union of the Council having plumbing and pipefitting jurisdiction in Ontario Labour Relations Board Geographic Area No. 8, request and require that you assign the following particular work at the project to members of Local 46 rather than to members of Christian Labour Association of Canada, namely:

- (a) Site services, plumbing and drainage, including the handling, fabrication and installation of complete plumbing and drainage systems;
- (b) Heating and cooling systems, including the handling, fabrication

and installation of all piping systems and related equipment for complete heating/cooling system;

- (c) Ventilating, including the installation of all piping and related pumps or other equipment;
- (d) Fire protection, including the handling, fabrication and installation of the fire hose and standpipe systems;
- (e) Central systems, including the handling, fabrication and installation of all or any pneumatic control system;
- (f) Sleeving, drilling and cutting holes including the sleeving or drilling of all holes required in floors or walls for installation of such piping systems as above;

For purposes of clarification, we wish to advise you that this request for work assignment does not include thermal insulation of and covering of piping, fittings, pumps, valves, boilers ducts, flues, tanks, vats or equipment at the project."

Also tendered at the hearing was the following letter by Simcoe dated May 12, 1981:

"Re: Town of Vaughan Office Building Expansion

Dear Sir:

Referring to your letter dated April 23rd we regret to inform you that since our workforce has a contract with the Christian Labour Association of Canada we will be unable to accept your offer to employ members of Local 46."

The parties accepted these letters as facts in the present matter.

3. Counsel for the respondent, Simcoe, argued first, that the performance of work under a collective agreement, in this case by CLAC, under its agreement with Simcoe, does not give rise to the jurisdictional dispute and cites *Day Signs Limited*, [1976] OLRB Rep. May 217, and in particular the following line from paragraph 2:

"The Board noted that where an employer has certain work performed by certain employees pursuant to a collective agreement it may not be said that such an employer was or is assigning work to persons in a particular trade union rather than the persons in another trade union."

Counsel thus urged the Board to find that the requirements of section 81(1) and for the purposes of jurisdiction had not been met. Counsel also argued that the present dispute was "not your common garden variety jurisdictional dispute" but was rather a representational dispute. He urged the Board to characterize the dispute between two trade unions in this case as a representation dispute, and thus, decline to deal with it as a dispute concerning work assignment under section 81.

4. Counsel for the respondent, CLAC, adopted the position of Simcoe and further argued that the Board ought not to use section 81 to alter bargaining rights. He thus argued that the overall scheme of *The Labour Relations Act* deals substantially with representation issues and that section 81 ought to be interpreted in that context, thus, where bargaining rights might be altered, the Board does not have the jurisdiction to deal with that under section 81 of the Act. In short, if Local 46 of the Plumbers wants to displace CLAC they ought not to be able to do it under the guise of section 81 but should use the certification mechanisms set out in the Act.

5. Counsel for CLAC also argued that on a reading of section 81(1) the complainants had not complied with the requirements of the section. Counsel divided section 81(1) into two parts as follows. He thus argued, in terms of the first part of the section, that the trade union doing the requiring was the complainant, and that the Board ought not to entertain complaints by the complaining trade union. That is, under part one of the subsection, it is only the employer making the assignment that is complained of, and the union that has the work which can make the complaint. On the other hand, with regard to the second part his position is that Simcoe, by employing members of CLAC according to a collective agreement is not assigning to members of the CLAC. In support of which he also referred to the quotation from the *Day Signs* case referred to above.

6. Counsel for the complainants noted that in the past the Board has, on numerous occasions, entertained complaints by the complainant, where the complainant was the trade union seeking the assignment of work, in particular he cited *Ilena Construction*, [1974] OLRB Rep. Nov. 775. He also noted that the language in section 81(1) does not place any restriction on who may file the complaint. He thus argues that the complainants having requested Simcoe to assign the work in dispute to its members, by virtue of the letter of April 23, 1981, the complainant has satisfied the jurisdictional requirement of section 81(1). In this regard the quotation from the *Day Signs* case quoted above in support of the respondents case is taken out of context. At best it stands for the proposition that by merely complying with a collective agreement the employer is not choosing between one trade union rather than another. However, by ignoring the request of the complainant as is done in the respondent Simcoe's letter of May 12th, the employer is subsequently assigning work to members of the CLAC rather than to members of the complainant trade union.

7. Counsel for the complainant also argues that the Act does not bear out the distinction proposed by counsel for the respondents between a representation dispute and a jurisdictional dispute. Indeed all jurisdictional disputes involve an element of representation, and further, section 81 by subsections (16), (17) and (18) contemplate interference with representation rights. He thus argues that the complainants, having claimed the work from Simcoe, and Simcoe continuing its assignment of the work to CLAC rather than Plumbers Local 46, satisfied all of the requirements for the Board to take jurisdiction under section 81(1). In fact, counsel went further and asserted that the Act contemplates the bringing of section 81 complaints in such circumstances precisely as an alternative to jurisdictional picketing and strikes.

8. At the conclusion of the hearing on this preliminary point, the Board by an oral decision, found that the Board had jurisdiction under section 81(1) to entertain the present complaint. Simply put, the arguments of both the respondents concerning the representational rather than the jurisdictional nature of the present case are arguments which

go to the merits of the case. Whether or not the Board decides to give a remedy which overrides existing representational rights is a matter for the panel hearing the merits of the present case. In this regard, the quotation from the *Day Signs* case is clearly taken out of context. The statement quoted simply notes that an assignment of work pursuant to a collective agreement is not an assignment to one trade *rather* than another. However, in the present case, although the original assignment to CLAC may have started out within the language quoted, once the complainant, Local 46, requested an assignment of work then the continued assignment of work to members of the CLAC rather than Local 46 constitutes a fact situation coming within section 81(1) as a consequence of which the Board has the jurisdiction to deal with a complaint concerning that continued assignment. In this regard we agree with counsel for the complainants that section 81(1) as a jurisdictional matter, does not contain any limitations as to who can file a complaint. In any event, however, we are of the view that the present complaint falls under the second branch of the jurisdiction of the Board outlined in the argument by the respondent CLAC. In the present case Local 46 and the Building Trades Council are, simply put, complaining that Simcoe is assigning work to members of the CLAC rather than the members of Local 46. That being the case we are of the view that the Board has the jurisdiction to entertain this complaint on its merits.

9. We now turn to the other argument of the respondents, that the present complaint is a representation complaint rather than a jurisdictional dispute, and that section 81 should not be given so broad an interpretation as to render meaningless those sections of *The Labour Relations Act* relating to certification proceedings. We are of the view that these arguments go to the merits of the dispute and to the form of remedy which the Board might grant the complainant. They do not, however, go the preliminary issue of whether the Board has the statutory power to entertain such a complaint as filed by the complainant in the present case. In this regard we are compelled to note that section 81 must give the Board broad powers to entertain such complaints in order to be effective as an alternative to jurisdictional work stoppages.

10. In this regard the statutory history of section 81 is of some importance. The predecessor of the current section 81 was introduced into *The Labour Relations Act* by Statutes of Ontario 1960 Chapter 54 as section 58 of *The Labour Relations Act*. That provided for the establishing of a "jurisdictional dispute commission" which made orders with respect to work assignment disputes established under that provision. With the statutory revision of 1960, that became section 66 of *The Labour Relations Act*. The section continued to provide for the dealing of complaints concerning work assignment by a Jurisdictional Dispute Commission rather than the Labour Relations Board until 1966, at which point, by Statutes of Ontario Chapter 76, the Board itself was given jurisdiction to deal with work assignment disputes under section 66.

11. Section 81 as it presently stands was introduced into *The Labour Relations Act* by statutes of Ontario 1970 Chapter 85.

12. Prior to 1970 the provision of *The Labour Relations Act* dealing with jurisdictional disputes was basically a very narrow statutory provision. First the section recognized the existence of other forums for dealing with jurisdictional disputes and provided that where all the parties agreed to another form, the Board does not have the jurisdiction to entertain a complaint under that section. Prior to 1970, however, the provision contained two other limitations. First off, the general notion that there must be an actual requiring "of certain

work”, and secondly, that the Board could only entertain a complaint where an employer *employed* members of both the competing trade unions. Thus, a complaint did not lie if the employer only employed members of one union. This in turn made the section extremely narrow since many employers, particularly in the construction industry where jurisdictional disputes are a major concern, simply use members of one union. This meant that prior to 1970, the Board could not deal with many of the jurisdictional disputes brought before it.

13. In 1970 the Legislature changed the jurisdictional dispute provision in the Act by simply amending subsection 1 of what is now section 81 by changing the word “employees” to “persons” so that the Board had jurisdiction to entertain work assignment complaints regardless of whether an employer actually employed members of the competing trade unions. This meant that the Board could now hear complaints concerning work assignments in much broader circumstances that it could before. Note, however, that the change simply enables the Board to entertain the complaints. It does not speak to the question of whether the Board ought in fact to issue a remedy, once it entertains the complaint, but nor did the amendment speak to the kind of remedy that the Board ought to make under section 81.

14. In the present case, it is clear that prior to 1970, the Board would not have had the jurisdiction to entertain the present complaint, since it is clear that the respondent, Simcoe does not *employ* members of the complainant, Local 46 of the United Association. It is clear, however, that since 1970 such a requirement is no longer necessary for the Board to take jurisdiction in these matters.

15. Counsel for the respondent, CLAC, also raised a preliminary objection, concerning the status of the two Associations to intervene. The Board has for many years taken a very broad view of allowing parties to appear in section 81 complaints. Frequently, work assignment disputes affect parties who have collective bargaining relations with the competing unions. The Board has allowed such employer associations to participate in the proceedings, see for instance *Ilena Construction*, [1974] OLRB Rep. Nov. 775. We therefore find that the interveners are entitled to status in these proceedings.

16. In view of the foregoing the Registrar is directed to list this matter for hearing on the merits.

2421-80-M Canadian Union of Public Employees and its Local 1701, Applicant, v. Town of Gananoque, Respondent

Employee – Reference – Whether accounting clerk having access to wage and budget proposals employed in a confidential capacity

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL; July 17, 1981

1. This is an application under section 95(2) of the Act. The Town of Gananoque seeks a declaration that Mrs. Corinne Wendt, classified as accounting clerk, is not an employee within the meaning of section 1(3)(b) of the Act. There is no suggestion in the evidence that Mrs. Wendt exercises managerial responsibility in the sense of supervising others or making independent decisions or effective recommendations. The issue is whether she is confidentially employed in matters of labour relations.

2. Mrs. Wendt reports to the clerk administrator of the Town, and on occasion performs work for the deputy clerk and the deputy treasurer. Part of Mrs. Wendt's responsibilities involves opening and distributing mail. The evidence establishes that she has become privy to the content of the Town's budget in the course of its preparation, once being responsible for running off copies of several drafts, as the budget proceeded. She has also been involved in typing material central to the Town's strategy in bargaining with the union. In this regard, as part of the employer's preparation for bargaining, Mrs. Wendt once typed up information regarding to cost to the Town of different percentage increases in wages.

3. On the whole there are few facets of her work that involve confidential knowledge relating to labour relations. By the same token, however, the knowledge she has access to, specifically the written material prepared as support data for the exclusive use of the Town's bargaining committee, is extremely sensitive. She has been employed for only three years, and it appears that the period of her service has spanned only one set of negotiations for a collective agreement. The unchallenged evidence, however, is that on the occasion of negotiations she prepared wage costing figures central to the employer's strategy and position in bargaining. The evidence is that such work, whenever it arises, is hers to do, and is not part of the regular workload of any other member of the staff.

4. A central purpose for excluding from a bargaining unit persons who have access to confidential material relating to labour relations is so that the employer can know that its internal strategies and communications are known and handled exclusively by persons of undivided loyalty. In *The Regional Municipality of Haldimand-Norfolk (Norview Home for the Aged)*, Board File No. 2193-76-R, unreported, July 18, 1977 the Board commented:

"Each case is to be determined on its own facts and on the totality of the evidence. Counsel for the applicant conceded, as he must, that the typing of lists of employees in applications for certification involves sensitive information as regards labour relations. The same is true of the handling of and access to the employer's communications on its consultant on matters going to the heart of its strategy at the bargaining table. Discreet

secretarial help is essential to any employer and that is manifestly so in matters of labour relations. The purpose of the section 1(3)(b) exclusion relating to confidentiality is to assure that the employer may freely function in the collective bargaining framework without the disability of any conflict of interest in a vital member of its team.”

5. In the instant case Mrs. Wendt’s access to confidential matters pertaining to bargaining is of itself sufficient to raise an inevitable conflict of interest with respect to the division of her loyalties between employer and union. We therefore conclude that she is not an employee within the meaning of section 1(3)(b) of the Act.

DECISION OF THE BOARD MEMBER, O. HODGES;

1. I dissent.

2. Mrs. Wendt is classified as an accounting clerk. Her duties are general in nature, including typing, mail opening, photocopying, answering the phone, and acting as a receptionist. As noted in the majority decision, there are few aspects of her work which pertain to labour relations.

3. As part of her job, Mrs. Wendt would occasionally open letters containing grievances and in her office she maintained a file containing the Town’s correspondence. However, as the affected trade union’s would presumably be aware of the details of their correspondence with the Town, this information cannot be confidential. I note that Mrs. Wendt testified that she never typed letters concerning employees and did not have access to any personnel files.

4. Mrs. Wendt testified that in previous years she may have been involved with the preparation of the Town’s budget. However, her involvement appears to have been of a cursory nature, and, in any event, there is no evidence that this a matter pertaining to labour relations.

5. On only one occasion can Mrs. Wendt be said to have been involved in a confidential capacity in a matter relating to labour relations. Prior to the start of negotiations with the trade union she once typed some information regarding the cost to the Town of different salary increases. It appears that this was an isolated incident.

6. In my view it is relevant that there were two other employees who could have been asked to perform this “confidential” work instead of Mrs. Wendt. Mrs. Bishop, the Deputy Clerk was Mrs. Wendt’s regular replacement. Mrs. Thompson, the Deputy Treasurer was customarily involved in the preparation of the Town’s budget. Bearing this in mind, the employer cannot put forward his reliance on Mrs. Wendt’s services in the area of confidential labour relations as the reason for her exclusion from the bargaining unit.

7. In *United Community Fund of Greater Toronto* [1979] OLRB Rep. Dec. 1292, the Board stated at page 1283:

“The handling of collective bargaining information must be at the core of the disputed individual’s job functions. An occasional or peripheral

involvement is insufficient to justify his exclusion.” (See also: *York University* [1975] OLRB Rep. Dec. 945).

8. It is difficult to imagine an involvement in confidential labour relations more peripheral than that of Mrs. Wendt. It would be gravely inequitable to deny this employee the benefits of collective bargaining merely because her employer once foisted upon her a task of a marginally confidential nature. I would conclude that Mrs. Wendt is an employee within the meaning of the Act and that section 1(3)(b) has no application.

0135-80-R Operative Plasterers’ and Cement Masons’ International Association, Local 598, Applicant, v. Labourers’ International Union of North America, Local 183, Respondent, v. **Underground Services Limited**, Intervener

Construction Industry – Whether work on expressway within ICI sector – Whether agreement restricted to ICI sector conferring bargaining rights in respect of other sectors

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. A. Ronson and C. A. Ballentine.

APPEARANCES: *L. Arnold for the applicant; S. Wahl for the respondent; W. J. McNaughton for the intervener.*

DECISION OF VICE-CHAIRMAN, D. E. FRANKS, AND BOARD MEMBER J. A. RONSON; July 20, 1981

1. This is an application for termination of bargaining rights made under section 52 of *The Labour Relations Act*. It is one of a series of cases which arise from the same set of facts; a section 79 case, Board File No. 0134-80-U and a section 112a referral of a grievance, Board File No. 0394-80-M arise from these facts.

2. At the commencement of these proceedings, counsel for the respondent raised two preliminary objections to the application for termination. Namely, that the applicant does not have the status to make an application under section 52 because it does not represent employees in the bargaining unit, and secondly, because an application under section 52 must be made within the first year of the first collective agreement between the parties. The applicant claims to represent the employees affected by this application by virtue of two documents, one dated July 27, 1978 and another dated May 11, 1979. By decision of this Board dated July 11, 1980, the Board allowed the applicant, in this termination proceeding, to adduce evidence concerning a latent ambiguity in these two documents.

3. The document dated July 27, 1978, is in the form of a standard area collective agreement between the General Contractors Section of the Toronto Construction Association and Local 598 of the Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada. It was signed on behalf of Underground Services Limited by

Mr. G. H. Moreau, Area Manager. That collective agreement contains the following recognition clause:

ARTICLE 3 — RECOGNITION

(a) The Association recognizes the Cement Masons' Union, Local 598 as the sole and exclusive bargaining agent for its employees engaged in cement finishing work as defined herein on the job site in the *Industrial, Commercial and Institutional Sector* and only members of the Union will be employed to do any and all cement finishing work as defined in Article 9 of this Agreement. (emphasis added)

The document dated May 11, 1979, reads as follows:

VOLUNTARY RECOGNITION AGREEMENT

Between:

OPERATIVE PLASTERERS' AND CEMENT MASONS'
INTERNATIONAL ASSOCIATION, LOCAL 598

(hereinafter referred to as the UNION)

and UNDERGROUND SERVICE LIMITED

(hereinafter referred to as the EMPLOYER)

THE EMPLOYER hereby recognizes THE UNION as the exclusive Bargaining Agent of its employees in the Bargaining Unit described as follows:

All working foremen, journeymen and apprentice cement masons and water-proofers engaged in the industrial, commercial and institutional sector of the Construction Industry in Ontario Labour Relations Board Area(s) Number(s)

Dated this 11 day of May 1979

OPERATIVE PLASTERERS' AND CEMENT
MASONS' INTERNATIONAL ASSOCIATION,
LOCAL 598

PER:

(signed) Giovanni Balanzin
Business Manager
Local 598

(signed) C.H. Moreau
EMPLOYER
Area Manager

4. The employees affected by this application for termination are employed by Underground Services on the refurbishing of the concrete columns which support the Gardner Expressway in the downtown Toronto area. It appears that the concrete columns have been deteriorating due to salt from the roadway above. As a consequence, over a period of years,

the columns are being systematically refurbished. The refurbishing work involves chipping away the concrete and in some cases replacing the reinforcing steel which also in corroded. These are then refinished with a material which is prepared on the ground and forced into place using compressed air. A portion of the work was done in the summer of 1978, another portion done in the summer of 1979 and then a third portion in the summer of 1980. During the 1978 and 1979 seasons, the men performing the work were supplied by the applicant, Operative Plasterers Union. During 1980 the employees were supplied by the respondent, Labourers Union Local 183.

5. The Board heard the detailed evidence of Mr. John Balanzin, the Business Manager of Local 598, concerning the signing of the two documents referred to in paragraph 3 above. The standard agreement dated April 14, 1977, was signed by Mr. Balanzin and Mr. G. H. Moreau on July 27, 1978. It appears that Underground Services had commenced work on the Gardner and Mr. Moreau had called the Union Local to ask if the union would supply men to the job site. As a consequence, men were sent from the union's hiring hall to the job. The following day Mr. Balanzin visited the job site where he and Mr. Moreau signed the agreement. There appears to have been no discussion about the language of the agreement, but it is also clear that that collective agreement was applied to the job during the summer of 1978.

6. The other document, the one dated May 11, 1979, arose as a consequence of the provincial agreement relating to cement masons and waterprooferers. That provincial agreement was signed in October 1978. At the time it was signed Local 598 had supplied all of the men on the job at the Gardner. It is not in dispute that the only job that Underground Services had during 1978 and 1979 was the Gardner Expressway job. Nor is it in dispute that during the summer of 1978 and 1979 the documents referred to were applied as the collective agreements for the employees of Underground Services Limited at the Gardner Expressway project.

7. Two points from the evidence of Mr. Balanzin should be emphasized. The first is that the documents tendered as collective agreements are the basic agreements for cement masons and waterprooferers signed by Local 598. That is, the union does not normally make separate collective agreements for sectors other than the industrial, commercial and institutional sector. Secondly, although Balanzin stated in his evidence that the parties intended the agreement to apply to the work on the Gardner Expressway (and indeed they did apply it to the Gardner Expressway), it is clear that the parties never addressed the problem specifically as to whether the work in question fell within the language of the recognition clause of the two documents. That, in turn, limits recognition to the industrial, commercial and institutional sector of the construction industry.

8. In view of the foregoing evidence, the question arises, has the evidence established a latent ambiguity with respect to the collective agreements referred to in paragraph 3, such that this Board can admit extrinsic evidence to vary the clear language of the document themselves? We are of the view that the evidence does not establish such a latent ambiguity. The language of both the May 1979 document and the previous area collective agreement is quite clear in referring to the industrial, commercial and institutional sector. To establish a latent ambiguity, the applicant trade union would have to demonstrate, for instance, that by common practice, the parties considered work by cement finishers on those columns as part of the industrial, commercial and institutional sector. Unfortunately, for the applicant, the evidence does not go that far. The fact that the agreement was applied, or even that the parties

thought it applied, in the absence of some justification for this opinion does not create a latent ambiguity in language that is otherwise crystal clear. Indeed there are numerous Board cases which indicate that the mere application of a collective agreement to a particular situation does not lead the Board to the conclusion that the agreement applies, in the face of clear language, to the contrary.

9. Indeed, we should note what is perhaps obvious to everyone, that the term “industrial, commercial and institutional sector” in relation to construction industry collective agreements is a term defined in *The Labour Relations Act*. It would take extraordinary evidence to demonstrate that when the parties use such a term and mean something other than that contemplated by *The Labour Relations Act*, that they are being “latently” ambiguous. In fact, one gets the impression from Mr. Balanzin’s evidence that the document of May 1979 arose precisely because the term industrial, commercial and institutional sector is a term in *The Labour Relations Act* relating to the provincial bargaining sections of the Act.

10. Having failed to establish a latent ambiguity we are left with the clear language of the recognition provisions in the two documents in question. It is clear to us that the employees affected by this application, whatever sector they are working in, they are not working in the industrial, commercial and institutional sector of the construction industry (they are probably working in the heavy engineering sector of the construction industry but it is not necessary to make that finding in the present case). In view of the foregoing, we are therefore of the view that the applicant does not have the status to make the present application for termination since it does not represent any employees affected by the application.

11. That being the case that is sufficient to dispose of the present application and it is not necessary for us to deal with the argument of whether or not the application is timely. In view of the foregoing reasons, the present application is dismissed. With respect to the two remaining applications, the section 79 application, Board File No. 0134-80-U and the section 112a reference, Board File No. 0394-80-M in view of our finding that the collective agreements do not cover employees working on the Gardner Expressway columns, we should like the applicant in those cases to show cause why we should proceed with the applications rather than dismissing them forthwith.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. It is difficult for me to disagree with the majority decision, “that the applicant has *failed to establish a latent ambiguity* because of the clear language of the recognition provisions in the two documents in question.” However, I am not satisfied that true justice has been served by this technical decision of the Board.

2. In view of the Board’s decision that the work in question is not within the I.C.I. sector of the construction industry, it is unlikely that the applicant will continue with its section 79 and section 112a proceedings.

3. Underground Services Limited approached the Applicant to supply cement masons in 1978 and in good faith, signed collective agreements with the Applicant in 1978 and 1979. Members of the Applicant were employed by the Company under the terms of those collective agreements.

4. In 1980, the Respondent, Local 183 of the Labourers' International Union of North America, and the Company came to an understanding, whereby a 1977 Sewer and Watermain Agreement with a cross over clause to include heavy construction would be applicable to the work on the Gardner Expressway. Local 183 supplied its members in 1980 to the Company to perform the identical type of work which had been performed by the members of the Applicant Union in 1978 and 1979.

5. It is my position that the Company in good faith entered into a contractual relationship with Local 598 of the Operative Plasterers and Cement Masons International Association in 1978 and subsequently renewed that contractual relationship in 1979. The Company should not now be allowed to escape from its obligations through a technicality. However, as previously mentioned, it is difficult to see how the applicant could now succeed in its section 79 and 112a proceedings, although sections of the Act may be relied upon by the Applicant Union to obtain a just result.

**2563-80-R; 2645-80-U International Woodworkers of America,
Applicant/ Complainant, v. Upper Canadian Furniture Limited,
Respondent**

Certification – Interference in the Trade Union – Pre-Hearing Vote – Section 7a – employer supporting employee association competing with union – Section 56 violated – Whether affecting conduct of vote – Whether section 7a applicable – New vote directed with other remedies

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Jeffrey Egner and Harold Sachs for the applicant/complainant; R. N. Gilmore, Barbara Lackman and Ian W. Richardson for the respondent.*

DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; July 16, 1981

1. The applicant has applied to be certified as the exclusive bargaining agent of the full-time employees of the respondent. By a decision dated March 9, 1981, the Board directed the taking of a pre-hearing representation vote. The results of the vote were 20 to 27 against the applicant union. The outcome reflects a support level for the union of approximately 42.6 per cent.

2. Prior to the Board's direction that a pre-hearing representation vote be taken, the applicant filed a complaint under section 79 of the Act alleging that the respondent company had interfered with the employees' selection of a trade union contrary to section 56 of the Act and, contrary to sections 58 and 61, had sought by intimidation or coercion to compel the employees to refrain from becoming or to cease to be a member of the applicant union.

3. On the basis of the alleged facts supporting the section 79 complaint, the union

amended its application for certification seeking certification under section 7a of the Act notwithstanding the results of the pre-hearing representation vote.

4. On the agreement of the parties the Board consolidated the application for certification and the section 79 complaint.

5. The union's organizing drive commenced sometime in January of 1981 and culminated in its application for certification on February 23rd.

6. Earlier, on February 20th, four employees who were described as the steering committee circulated a petition to be signed by persons interested in forming an employee association. The Board accepts on the evidence that the heading to the petition stated that the steering committee would be having a meeting with management later that day to discuss the formation of an association.

7. The meeting with management took place at approximately 10:30 that morning. The general manager of the company, Mr. Ian Richardson, and the plant manager, Mr. Chris Meier, met with the four employees who composed the steering committee: Munroe Scott, Marjorie Westerman, Kyra Powell and Marion Scott. The Board concludes from the evidence that the meeting which lasted close to two hours was convened at the request of the employees rather than at the request of management.

8. After the employees gave management a general indication of the items they wished to discuss, they asked whether the company was aware of the union's organizing campaign. Richardson replied that he had no official knowledge of it. It is clear on the evidence, however, that from the latter part of January management had been privy to rumours of the union's drive. Mr. Meier testified that he had heard about it from an employee in January and passed the information on to Richardson.

9. At the mention of the union at the meeting, Richardson stated that the company could not discuss anything that would be injurious to the union's attempt to be certified. According to Richardson, the employees then explained that they were thinking of starting a plant committee in order to improve communications between management and employees. Richardson expressed agreement with the objective.

10. During the meeting many matters concerning conditions of employment were discussed. Among others they talked about the exacerbation to employee/employer relations caused by one particular supervisor's unskilled handling of employee problems. They then discussed at length the establishment of a grievance committee that would improve communications by venting such problems. OHIP and dental coverage were brought up and discussed. Richardson expressed his view of the limited benefits that would derive from an increase in OHIP coverage. He further expressed his perception of the major problems involved in implementing dental plans. The employees then brought up the subject of job classification and job posting. Meier told the employees that while he was doing work on job classifications for the company, it wasn't ready for publication or discussion. With respect to job postings, Richardson could not recall whether they agreed at that meeting to implement a job posting scheme or whether, instead, they made that decision soon thereafter.

11. Richardson testified that he cautioned the four employees that they did not have a

mandate from the rest of the employees. He stated that he thought it was only fair to tell them that he didn't view their requests as representative of the true wishes of the employees as a whole. He explained to the Board that the four employees on the steering committee were long term employees and he did not feel they represented the newer employees. According to Richardson, the employees indicated they would go away and talk about the question of a mandate.

12. Before long Richardson had another discussion with the steering committee about the formation of the plant committee. When Richardson came across the four employees in the cafeteria, they related to him problems they were having organizing a plant committee. They told Richardson that they did not know how to proceed. In response he told them that while he could not help them he knew professionals in labour relations who were skilled in organizing associations and who could deal with such problems as a constitution and committee structure. Richardson acknowledged that he indicated to the employees that he could refer them to such professionals if that was their wish. He explained that he saw no problem with suggesting resources and thought he might be the only one among them who would know such people. He indicated that if it had not been for the union he would have been more active in providing resources. Richardson further commented to the Board that he was trying to walk the tight rope between assuring that the wishes of the employees as a whole were being satisfied, on the one hand, and not injuring the union's organizing attempt, on the other.

13. Richardson testified that his encounter with the employees in the cafeteria lasted approximately five minutes. He could not state whether during that time there were other employees around who would have seen him in discussion with the steering committee. He acknowledged that the employees' discussion did not occur during their coffee break but rather took place on company time. Richardson stated that he felt it was appropriate for them to use company time to discuss the formation of a plant committee. He explained his attitude by saying that if employee wishes could be satisfied by a meeting of four employees in the cafeteria on company time then it was alright with him.

14. Days later, on the day the Board's official notice of application for certification was posted at the company, another notice was posted on the same bulletin board. This notice was headed by the names of the four people on the steering committee and announced that a meeting of employees was to be held in the cafeteria that day.

15. According to Susan Evans, an employee in the bargaining unit, the notice stated that all employees were to attend and indicated that the four employees listed at the top of the page were the steering committee. She testified that before that notice she had not heard of a steering committee. The meeting was scheduled to begin at 3:10 p.m. which, according to Evans' uncontradicted testimony, followed immediately upon the employees' coffee break. The Board accepts on the evidence that the meeting lasted approximately one hour covering a period of time when the employees would otherwise have been working.

16. Richardson testified that he gave permission for the meeting to take place. In explaining his rationale he stated that if the four employees had taken a further step in relation to the plant committee and had made up their minds about what they wanted to do, and if other employees were interested in the plant committee, then he felt the employees should be given an opportunity to hear what the four employees had to say. When asked if he would have

allowed the union to conduct a similar meeting on company time and on company premises, he replied that he would have judged it had he been asked.

17. Three employees, one of whom was Evans, gave evidence as to what transpired at the meeting. Munroe Scott, a member of the steering committee, chaired the meeting. He began by saying that because of the union it was a bad time but they were there to discuss the plant committee. By Evans' evidence which the Board accepts, Scott emphasized throughout the discussion that what the steering committee was doing had nothing to do with the union. He asserted that the plant committee could function as well as a union and that they did not need a union. Evans testified that Scott and Westerman stated that they had already discussed setting up the plant committee with management and noted specific areas that had been covered. Both Evans and Mark Sloggett, another employee to testify about the meeting, stated that Munroe would not allow any of the employees to talk about the union. Sloggett indicated that numerous employees wanted to discuss the union and the association in comparative terms. Every time the union was brought up, however, Munroe would declare that what they were doing had nothing to do with the union and would re-assert that the purpose of the meeting did not include a discussion of the union. Evans testified that when someone spoke up Scott simply shut them out by continuing to talk.

18. The consistent evidence of the employees testifying about the meeting is that Scott told the employees that Richardson would bring in a consultant friend to help set up an association.

19. With respect to the establishment of a committee to set up the association the Board concludes on the evidence that Scott first announced that the steering committee together with management would decide who would be on it. When employees stated that they wanted an election, however, Scott agreed.

20. A vote by show of hands was taken at the meeting to determine how many were in favour of the plant committee. Evans testified that half of the employees there were Portuguese and that most of them could not speak English and would communicate with English speakers in sign language. Just prior to the vote, Scott asked a fellow employee to explain in Portuguese what was happening. According to Evan's uncontradicted testimony, the employee used approximately twelve words to make his explanation and the hands of the Portuguese employees went up in favour of the association.

21. Evans testified that in the days following the meeting she heard rumours that if the union came in the plant would close and that employees involved with the union would be fired. She acknowledged that she never approached management about the truth of the rumours. Evans was the only one of the three employees to testify to mention such rumours.

22. Sloggett stated that he has not heard anything more about the plant committee since the taking of the Board's representation vote which was lost by the union. At the employees' meeting Scott had said that there would be another meeting the following Thursday. It did not, however, materialize. When he asked Munroe why no meeting had taken place he replied that he had not yet talked to Richardson about it.

23. Section 7a of the Act provides as follows:

Where an employer or employers' organization contravenes this Act so

that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

24. To be certified pursuant to section 7a of the Act a union must establish firstly, that the employer has contravened the Act, secondly, that by virtue of the contravention it is unlikely that the true wishes of the employees would be ascertained and thirdly, that the union has membership support adequate for the purposes of collective bargaining.

25. We turn to the question of whether the employer has violated the Act. Sections 56, 58(c) and 61 of the Act provide as follows:

Section 56

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employee by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

Section 58(c)

No employer, employers organization or person acting on behalf of an employer or an employers' organization,

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

Section 61

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

26. The union argued that the employer authorized, permitted and encouraged the formation of an employee association knowing that it would have an adverse effect on the

union's drive for certification. Counsel for the union emphasized that management encouraged the formation of the plant committee by telling the employees on the steering committee that to have an impact with management they would need a mandate from the employees. As the steering committee then began the task of organizing, counsel argues, they again received assistance from management. He points out that management permitted the steering committee to hold a meeting on the company's premises during company time and that management further told the committee that it would recommend a professional labour relations consultant to assist them with the details of organizing a plant committee. The union argues that given the backdrop of the union's campaign of which the company was well aware, the company's actions must be viewed as assisting and encouraging the employees to mount a parallel drive to compete with the union and as such contravenes *The Labour Relations Act*.

27. The allegation that an employer has violated the Act by promoting an employee association to compete with a union seeking certification has been previously dealt with the Board.

28. In *Homeware Industries Limited*, [1981] OLRB Rep. Feb. 164 the Board held that the employer's conduct constituted a violation of section 56 of the Act. In that case, as in the one before the Board, management was first approached by employees who were discontent with the union. Unlike the circumstances in the instant case, however, the manager in *Homeware* met with the employees at large and suggested that they consider alternatives to being represented by an international union. He further told the employees that they should elect people to speak on their behalf. In *Homeware*, as in the case before us, the employer permitted activity relating to the formation of the association to take place on company premises during working hours. In addition, however, one of the vice-presidents of *Homeware*, during an in-house vote, posted a notice telling employees to be careful about voting for the union until other alternatives such as the formation of an employee committee had been tried. Once the employee committee was formed the members met with the vice-president of the company during working hours to discuss such matters as wages and benefits.

29. In contradiction to the expressed preference of two members of *Homeware's* management for the creation of an employee committee, the Chairman of the Board of the company stated that he would deal with the Steelworkers but not an informal employee committee. The evidence reveals that his preference for dealing with the Steelworkers was passed on to the employees.

30. The Board in *Homeware* concluded that management's conduct constituted a breach of section 56 of the Act. At p. 165 the Board said,

We are satisfied that management's action in proposing the establishment of an employee committee where none had existed before, and then dealing with the committee with respect to working conditions, was done so as to draw employee support away from the applicant trade union and towards the committee. We view this as a form of employer interference in the selection of a trade union by employees contrary to section 56 of the Act.

The Board declined, however, to certify the applicant union under section 7a of the Act and instead ordered the taking of a representation vote. The Board at pp. 167-168 explained its rationale:

Employees do not expect employers to welcome the unionization of their work forces and a clear indication of this fact by an employer, standing by itself, is not likely to have an unduly coercing influence on employees. The matter takes on a different complexion, however, in those situations where management goes further and also indicates to employees that the selection of a trade union will put their continued employment in jeopardy. In the instant case, nothing said or done by either Mr. Robertson or Mr. Drake would have caused a reasonable employee to be concerned that support for the applicant might result in loss of his employment. Mr. Carney's statements, however, to the effect that the Beaverton plant had closed down in part because of the union did in fact link unionization with a loss of employment.

Under other circumstances, statements like those made by Mr. Carney, when coupled with active management support for an employee committee, might well give rise to a conclusion that the true wishes of employees would not likely be ascertained in a representation vote. In this case, however, certain other considerations come into play. First of all, the statements were made by Mr. Carney, a foreman. Not only did more senior management not repeat the statements, but when the matter was raised with Mr. Drake, Vice-President of the respondent, Mr. Drake indicated that the Beaverton plant had not been closed. Further, it is reasonable to assume that over time employees would have become aware of the fact that the Beaverton plant had not been closed but was still operating. Employees would also likely be aware of the fact that for some time employees at the respondent's plant in Downsview have been represented by the applicant trade union. In addition to all this, certain employees were advised that the respondent's Chairman of the Board had indicated a willingness to deal with the applicant trade union.

The Board concluded at p. 168 that the specific steps it was taking to remedy the employer's breach of section 56 of the Act would enable the employees to express their true wishes in a representation vote:

When all of these considerations are taken into account, we feel that if the applicant trade union is given an opportunity to address employees during their working hours so as to provide it with an opportunity to counter the effect of the respondent's earlier interference with employee rights through its support for the employee committee, and with the posting of the attached notice, made an appendix to this decision, employees will in fact be able to express their true wishes in a representation vote conducted by the Board.

31. In *Somerville Belkin Industries Limited*, [1980] OLRB Rep. May 791, the Board considered a similar factual situation, that is, an employer's involvement in the promotion of an employee committee during the currency of a union's drive for certification. In *Somerville* an employee approached the operations manager to inform him that the union was trying to organize the plant. He stated that he did not want a union in the plant because he felt the union would jeopardize his job and asked if he could have permission to conduct a meeting to talk to

the employees. The operations manager agreed on the condition that any employees who wanted the union would be given equal time to speak at the meeting. He then arranged to have the plant closed down for one hour.

32. When the employee opened the meeting he stated that the purpose of meeting was to clear the air. He then proceeded to describe his opinion of the adverse effect the union would have on their working conditions. It was only during the meeting that employees were first informed of the equal time format established by the employer. Given the timing of the announcement and the tenor of the meeting it may not be surprising that no one at the meeting spoke in favour of the union.

33. After concluding that the employee who conducted the meeting had breached section 61 of the Act, the Board considered whether the employer's involvement constituted a contravention of section 56. At pp. 800-802 the Board determined that the employer's gratuitous provision of its premises to employees opposed to the union constituted a violation of section 56 of the Act:

As has been said by the Board in many past occasions, the general thrust of the legislation is to ensure that there be an arms length relationship between an employer and trade union and to that end section 3 provides that "every person is free to join a trade union of his own choice and to participate in its lawful activities", and sections 56, 58 and 61 proscribe conduct which interferes with that freedom. The Board's jurisprudence is clear that the gratuitous use of premises provided by an employer in connection with the formation of a trade union constitutes "other support" within the meaning of section 12 of the Act and precludes the certification of such an employee organization. See the case of *Alco Compounders Inc.*, [1979] OLRB Rep. Sept. 845, and the references therein. We know of no instance in which the Board has dealt directly with the effect of gratuitous use of premises in respect to an alleged contravention of section 56. The question in the instant case is, whether, such gratuitous use of premises to supporters of those opposed to union organization constitutes a contravention of the section, and whether the offer of "equal time" to union supporters takes the conduct out of an otherwise potentially offending character.

...

It is clear to us that the respondent employer, by making available its premises to employees interested in mobilizing opposition to the union, and in undertaking to halt production without loss of wages to employees, was providing those interested in opposing the union with a substantial advantage over those who were endeavouring to marshal support for the union. As Frey himself expressed at the time of requesting permission to hold the meeting, a meeting was the "quickest way to handle it" and in our view both easier and more expeditious than going through individual canvassing such as was being done by the union. Obviously, it gave the Frey group quick and direct access to the total employee group.

There may be a given case where the gratuitous use of premises effectively provides a forum, equally accessible to all competing groups of employees to present their views by representatives of their own choice, which would not offend the legislation. In the instant case the manner and the content of the "equal time" offer were both defective in providing any meaningful opportunity to any group other than the Frey group. It must be noted that Graham [the operations manager] left the implementation of "equal time" in the sole hands of Frey, that it was clearly not available to "outsiders" but only to employees insofar as union supporters were concerned, that no prior notice was provided to union supporters so that they might consider organizing a presentation as Frey did, that there would be understandably, great reluctance by individual employees, to expose their support of the union. All these considerations militate against a conclusion that in fact the meeting would result in an even-handed presentation of opposing views. In point of actual fact, the announcement to the meeting of equal time appears to have been sandwiched between the end of Frey's formal presentation and the commencement of the question period, in such a way, as invites the conclusion that it would have been physically impossible to have provided an allotment of equal time had there been a demand for it. The Board can only speculate that it was a recognition of the inadequacy of the actual equal time offer which caused Frey to make his offers to the union organizers on Sunday to assist in organizing meetings of employees at which the union case could be presented.

The Board concludes based on all the evidence, that the gratuitous use of premises in the circumstances of this case must be construed as interference by the respondent employer in the selection of a trade union in contravention of section 56 of the Act.

34. Notwithstanding the Board's decision that the employer had breached section 56 of the Act by interfering with the employees' selection of a trade union, the Board declined to exercise its discretion and certify the union under section 7a of the Act. The basis of the Board's decision was its finding that with a support level of 5 per cent among the employees in the bargaining unit, the union did not have membership support adequate for collective bargaining. The Board expressed no opinion, however, as to whether, in the face of the employer's breach, the employees would have been able to freely exercise their wishes.

35. We turn to consider the employer's conduct in this case and determine whether it constitutes a violation of sections 56, 58 and/or 61 of the Act. In *Skyline Hotels Limited*, [1980] OLRB Rep. Dec. 1811 the Board at pp. 1827-28 discussed the unique character of section 56 of the Act:

The striking aspect of this section is that on its face it makes no mention of anti-union motive or purpose. It simply uses the word "interfere", which, in normal parlance, could be taken to connote either intentional or unintentional conduct. As the Board commented in *Westinghouse*, [1980] OLRB Rep. April 577, at paragraph 54:

“...section 56 of the Act can be interpreted as prohibiting any employer action which has the effect of interfering with the representation of employees by a trade union regardless of whether or not an anti-union motive exists.”

It would not matter, in that event, whether the employer could satisfy the Board of a legitimate business purpose for its conduct. But the Board has always had regard to industrial relations reality, and to the scheme of the Act as a whole, and has never interpreted the section in this manner. To do so would of course render meaningless the other specific provisions of the Act, such as section 58, which clearly require the finding of an anti-union motive. Any discharge of a union organizer, or perhaps of *any* employee during a campaign, for example, could be litigated successfully by a trade union under section 56, whether or not an anti-union motive could be shown under section 58. It is impossible to contemplate that section 56 creates that kind of an unfair labour practice. As the Board commented in *Ontario Banknote Ltd.*, (Board File No. 0590-80-U unreported):

5. The union's representative argued, notwithstanding the clear evidence [of no anti-union motive] before the Board, that a discharge during a union campaign can have a chilling effect on the ability to organize. That is no doubt true. Other innocent factors, such as lay-offs for good business reasons or a financial downturn might also have a negative impact on the fortunes of a union. As real as those concerns may be to a union, they are not matters which the provisions of the Act are designed to protect unions or employees against. They should, therefore, not be the basis of a complaint to this Board (*National Automatic Vending Co. Ltd.*, 63 CLLC ¶16,278 at p. 1162).

See also *Walker Brothers Quarries Limited*, [1980] OLRB Rep. July 1107, at paragraph 16. In the absence of an anti-union motive, in other words, it is not a violation of the section if the employer's conduct simply *affects* the trade union in pursuit of an unrelated business purposes. As the Board said in *A. A. S. Communications Ltd.*, [1976] OLRB Rep. Dec. 751, in commenting on this purposive meaning of the word “interfere”:

31. The essential element in any complaint under section 56 is employer interference with a trade union. A distinction must be made, however, between employer conduct that actually interferes with a trade union, and employer conduct that only *incidentally affects* a trade union. (emphasis added)

As has often been noted, however, the trade union will not in every case be required to prove by affirmative evidence the existence of an anti-union motive. This is so because the effect of certain types of conduct is so clearly foreseeable that an employer may be *presumed* to have intended

the consequences of his acts: *A. A. S. Communications, supra*; *G. W. Martin Lumber*, [1980] OLRB Rep. May 737; *Bank Canadian National*, [1980] 1 Can. LRBR 470; *Radio Officers' Union v. NLRB*, (1954) 33 LRRM 2417. Once such conduct has been established, then as a practical matter (and whether or not section 79(4a) of the Act applies to the situation) the onus is upon the employer to come forward with a credible business purpose to justify the conduct (cf. *NLRB v. Great Dane Trailers*, (1967) 65 LRRM 2465). It is up to the Board then, in all the circumstances, to decide what the motive of the employer really was.

36. Unlike the situation in *Homeware*, Richardson, the general manager of the respondent company, did not himself call a meeting of the employees to suggest alternatives to the union; nor did Richardson or any other member of management post a notice to employees telling them to carefully consider the alternative of an employee committee before voting for the union. In further contrast to *Homeware*, the employer in the instant case did not meet to discuss terms and conditions of employment with a formed plant committee. The proposed plant committee in this case has not in fact been formed. When approached by some employees, however, Richardson did take affirmative steps.

37. Employers may be placed in a difficult position when employees come to them for information about how to form an employee association. Even if there is not a simultaneous union campaign, the employer must be cautious about rendering assistance because the Board, pursuant to section 12 of the Act, will not certify an association if the employer "has participated in the formation or administration or has contributed financial or other support to it. . ." In *Alco Compounds Inc.* [1979] OLRB Rep. Sept. 845 the Board, for example, refused to certify an association when the employer had shut down the plant for an hour thus enabling the employees to meet on company premises and during company time to take steps to form the association.

38. If there is a simultaneous union campaign then even if the employee association is not seeking certification an employer must exhibit considerable caution in his relationship with persons known to favour an employee association over the union. Section 56 of the Act protects an employer's ability to freely express his views but only so long as he does not interfere with the selection of a union and so long as the expression of his opinion does not constitute coercion, intimidation, threats, promises or undue influence. For an employer to attempt to use his right to free speech to initiate an employee association to compete with a union is not protected by section 56. Even where an employer does not sow the seed of an employee association, its active support for the association may become a potent form of interference in contravention of section 56 of the Act. Given their economic dependence on their employer, employees may be readily swayed by employer conduct, even where subtle, which indicates support for an association over a competing union.

39. In the instant case the employees initiated the first meeting with the employer. Standing by itself the Board does not view the mere occurrence of the meeting as a violation of section 56. The employer's caution that the committee's effectiveness was limited by the fact that they did not have a mandate from the employees and its open support for the employee association which followed that initial meeting, however, are different matters. Standing alone it may be reasonable for an employer to want a group of employees to have a mandate from the rest of the employees before considering altering terms and conditions of

employment on the strength of their representations. In this instance, however, the timing of the employer's comment causes the Board concern. With the knowledge of a union campaign in progress the employer's comment threw employee support into a competition between supporters of the plant committee and supporters of the union. At this critical time the Board concludes that the employer knew or ought to have known that the natural result of his comment could be to pull some employees away from the union.

40. Following the initial meeting the employer openly condoned the steering committee taking steps on paid company time to form the plant committee. Later the employer further gave the steering committee permission to meet with all the employees, without loss of pay, on company premises, during working hours. The posting of the notice of the steering committee meeting directly beside the Board's notice of the union's application for certification could not reasonably be expected to be without impact. The company had met with the steering committee previously and knew that the four employees on that committee were against the union and wanted to form a plant committee to counteract the union. Accordingly, the employer either knew or ought to have known that the meeting would not develop into an open exchange of employee views but would instead be dominated by pro-plant committee employees, thus giving the anti-union segment of employees a significant advantage over the pro-union supporters in extending its message to the employees.

41. The Board concludes that the employer either knew or ought to have known that the steering committee would both tell the gathering that the employer was willing to refer them to a professional labour relations consultant friend to help them set up the plant committee and further announce that the employer had already met with them to discuss some conditions of employment. The Board is further satisfied that the employer either knew or ought to have known that these factors would weigh on employees and produce a significant anti-union, pro-employee committee impact. Having regard to the Board's decisions in *Somerville, supra*, and *Homeware, supra*, as well as the section 56 principles set out in *Skyline, supra*, the Board concludes that the employer's conduct constitutes overt discrimination against the union in favour of the proponents of the plant committee. In the circumstances of this case, it becomes interference in the free selection of a trade union contrary to section 56. By its conduct the employer conferred a special advantage on the pro-plant committee supporters just prior to the pre-hearing representation vote with no offsetting advantage given to the union. Though on two occasions Richardson told the steering committee that he could neither discuss nor do anything that would be injurious to the union's drive for certification, the positive impact of these remarks is compromised by the discussions that actually took place covering negotiating items typically brought forward by a union, the employer's willingness to refer the steering committee to a professional labour relations consultant and the employer's provision of its time and premises for an employee meeting chaired and dominated by pro-plant committee employees.

42. The Board cannot conclude on the evidence, however, that the discrimination was of such a nature, or that the employer's conduct was sufficiently threatening, coercive or intimidating to further constitute a violation of section 58 or section 61 of the Act. Although one witness testified that after the all-employee cafeteria meeting she heard rumours that the plant would close and that the union supporters would be fired, there was no evidence whatsoever either linking these rumours to management or suggesting that such rumours, if they did in fact exist, were widespread.

43. Did the employer contravene section 56 of the Act in such a way as to make it

unlikely, for the purposes of section 7a of the Act, that the true wishes of the employees can be ascertained?

44. In view of the employer's breach of the Act the Board is not satisfied that the results of the vote taken on March 19, 1981 reflect the true wishes of the employees. However, as in *Homeware*, the Board is satisfied that through another representation vote taken following the imposition of substantial remedies designed to neutralize the impact of the employer's violation of the Act, the true wishes of the employees can be ascertained. The Board, therefore, declines to grant a certificate to the union under section 7a of the Act.

45. Section 92(5) provides the Board with the authority to administer a second representation vote to determine the true wishes of the employees. It reads as follows:

Where the Board determines that a representation vote is to be taken amongst the employees in a bargaining unit or voting constituency, the Board may hold such additional representation votes as it considers necessary to determine the true wishes of the employees.

46. The employer contravened the Act by discriminating against the union by conferring upon the pro-plant committee supporters a substantial advantage to the foreseeable detriment of the union. This was largely accomplished by Richardson's comment to the steering committee that they did not have a mandate, by enabling pro-plant committee supporters to meet employees on company time, and by stating that he knew professional labour relations consultants who could assist the steering committee. The employer, did not however initiate the idea of the plant committee or, unlike *Homeware*, speak directly with the employees as a whole suggesting that they consider that alternative. Additionally the Board has concluded that the employer did not through its words or actions intimidate or coerce employees within the meaning of section 61 of the Act. Neither has the evidence established that the employer threatened employees with a lay-off, plant shutdown or anything else that would jeopardize their employment. As well, the employer did not discriminate against employees or refuse to continue to employ them within the meaning of section 58 of the Act. Accordingly, in the circumstances of this case, the Board is of the view that the impact of the employer's conduct may be neutralized through the Board's remedies. The evidence reveals, for example, that since the initial representation vote taken on March 19, 1981 the steering committee has not been active and the plant committee has not in fact been formed. While nominations were made for people to form a committee to take steps to form a plant committee, no further steps have been taken. It would not appear therefore that the steering committee has obtained a substantial hold on the workplace.

47. For the reasons set out above the Board is not satisfied, as it must be to grant a certificate under section 7a of the Act, that as a result of the employer's contravention of the Act the true wishes of the employees are not likely to be ascertained. We are satisfied in fact that given the nature of the employer's violation of the Act and the remedies set out below the true wishes of the employees will be revealed in a second representation vote.

48. There are numerous cases in addition to *Homeware* where the Board, as in this case, has declined to grant a section 7a certificate and has instead ordered the taking of a representation vote. In both *Daheim Nursing Home Limited*, [1980] OLRB Rep. Nov. 1639 and *Great Canadian Pizza Company*, [1980] OLRB Rep. Feb. 216 the Board, notwithstanding

questionable employer conduct, concluded that the employees could exercise their true wishes and ordered the taking of a second representation vote. In *Simcoe Manor Home for the Aged*, [1980] OLRB Rep. Nov. 1696 and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. April 419, the Board determined that despite an employer's express violation of the Act the employees, with the assistance of a remedial order, could express their true wishes in a representation vote.

49. To rectify the adverse impact of the employer's violation of the Act the Board orders the following:

- (i) That the employer post copies of the attached notice marked "Appendix" in both English and Portuguese as supplied by the Board in equal numbers, in conspicuous places on its premises, including commonly used bulletin boards, where it is likely to come to the attention of the employees; that the notices be posted until the conclusion of the representation vote ordered herein, that reasonable steps be taken to insure that the said notices are not altered or defaced or covered by any other material; that reasonable access be given by the respondent to a representative of the International Woodworkers of America so that the union can satisfy itself that this posting requirement is being complied with;
- (ii) That at least two representatives of the union be given an opportunity forthwith, and before the taking of the representation vote, to hold a meeting of all employees, without loss of pay, on the company's premises during working hours, such meeting to be allowed a minimum time of one hour. The union may, if it so desires, bring a person to the meeting for the express purpose of translating for employees who speak Portuguese;
- (iii) That the union be permitted reasonable access to the bulletin boards where notices to employees are regularly posted until the imposition of the silent period preceding the representation vote ordered by the Board herein;
- (iv) That the employer at its own expense send a copy of the Appendix in both English and Portuguese as supplied by the Board to the home address of each employee in the bargaining unit; and
- (v) That a representation vote be held among the employees in the voting constituency. All notices concerning this vote are to be posted in both Portuguese and English as provided by the Board.

50. Having regard to the agreement of the parties, the voting constituency is:

All employees of the respondent at Guelph, Ontario, save and except foreman, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

51. All employees of the respondent in the voting constituency on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

52. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

53. The Board remains seized of this matter in the event that there is any dispute over the implementation or interpretation of the Board's order.

54. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER O. HODGES;

1. I dissent.

2. In my opinion the evidence in this case is of sufficient weight to require the Board to certify the applicant under the provisions of section 7a of the Act. It is furthermore my view that the remedial Board order made by the majority is clearly required to make the certification effective. The trade union must have an opportunity to address the employees on terms similar to the accommodation afforded the "steering committee" of employees who were given assistance by the respondent.

3. Improvement of the negative employee attitude toward the trade union following the destructive activity of the "steering committee" and the overt support given to those employees by management should result from the remedial Board order. But can the fears raised by the activities of the gang of the four be dispelled sufficiently to allow the true wishes of the employees to be ascertained? I do not think so.

4. It is my conviction that the remedial Board order requiring a second vote for certification instead of a 7a certificate is labour relations wishful thinking. Collective bargaining by the trade union suffers double jeopardy by the majority Board order: there is first the very real risk of the fears now plowed into the minds of the employees not being purged by the remedial order alone and, second, there is the additional delay involved in the denial of the 7a certification.

5. Christian Meier the Plant Manager, was the second witness called by the respondent. However, his evidence reveals the genesis of the respondent's knowledge of the organizing effort made by the trade union. His testimony in chief was that one of the four employees had approached him on February 17 and asked for a meeting with Mr. Ian Richardson the General Manager. Meier could not remember the name of the employee.

6. Richardson was not in the plant that day, but Meier telephoned the Fergus, Ontario head office of the company who located Richardson in a company store. Meier called Richardson in a company store. Meier called Richardson and explained the employee's request. Richardson agreed to meet the employees and set February 20 as the meeting date. Whatever the employee said to Meier about a meeting with Richardson, it was of sufficient interest and urgency to prompt a company-wide search for whereabouts of the General

Manager of this plant. Asked by counsel whether he was aware of union activity at the time, Meier said he had heard of it by way of the grapevine during the latter part of January.

7. Questioned in cross-examination concerning his early grapevine information about union activity, he said an employee who looked up to him to have information about the matter had told him. Although not asked who it was who first informed him about the trade union, Meier volunteered the intelligence that he could not remember the name of his informant, nor whether he had been told by a man or a woman. Meier reported this incident to Richardson.

8. The credibility of Meier suffers considerably in my opinion because of his lapse of memory regarding the name of his unknown first informant or of the name of the employees who spoke to him on February 17. It is possible that Mr. Richardson did not ask who the informant was or that Mr. Meier would not have told him? Can it be that it was so unimportant he had since forgotten? There was no re-examination of this witness.

9. General Manager Ian Richardson was the first witness called by the respondent. He testified as indicated in para 6 to 13 of the majority decision. However, considering the early knowledge of union activity brought to Meier by an unknown employee and relayed to Richardson, together with the subsequent arrangements for the February 20 meeting made by Meier with Richardson, I cannot accept the majority para 7 conclusion. I am not satisfied that the "steering committee" development was entirely by employee initiative.

10. Richardson testified in chief that early in the 10:15 a.m. meeting on February 20 Marjorie Westerman put to him that he knew of the organizing activity by the trade union; "you know about the union". Richardson said he indicated that he knew nothing of it and could not discuss any antipathy toward the union. He further testified that "we took notes of the matters on the (employees) list, safety and others, and I said I would get back to them".

11. Richardson's denial that he knew about the union when the question was put to him by Marjorie Westerman was a neat attempt to sidestep the question of interference so as not to discourage the discussion of bargaining issues raised by the "steering committee". Richardson then promised he would respond to their concerns. The respondent backed up the evasive action by allowing a meeting of all employees during working hours a week later and by subsequently offering the "steering committee" an introduction to professional counselling for organizing an employee association.

12. The majority decision in para 14, 15 and para 17 through 22 deals with the evidence brought by the trade union. Susan Evans also said that all other employees including lead hands were at the called meeting. It was the Portuguese lead hand who translated the events of the meeting into a dozen words of Portuguese just before the vote. Half of those present were Portuguese and they all voted for the association. The majority remedial order has made a specific direction in this regard to provide an interpreter from the English to the Portuguese language at the meeting ordered to allow the trade union to address the employees during working hours. However, the time ordered for the meeting should be extended as required to take into account the additional time required for translation.

13. It was the further testimony of Evans that Kyra Powell for the "steering committee" got hostile in her anti-union remarks. The employees, Evans said, were stunned and afraid to

speak. Those who tried to speak were shut out. They were scared and afraid. The anti-union remarks were not tied to management but it is clear that many employees hearing such talk would be fearful. Evans testified in cross-examination that four people at the meeting whispered to her that they were scared to ask questions and she named them. Most people who did speak kept bringing up the union and asking "what is the Company doing?" and "what is going on?"

14. Immediately after the meeting Evans had a discussion with Steve Morrison, a supervisor who "runs the whole thing" as her immediate supervisor. He said that while he did not care what happened, he had experience with unions and he did not like them. Morrison had not attended the meeting.

15. Commenting on the duties of Scott Munroe, Evans said he was a lead hand who walked around and assigned work. "He tells the Portuguese what to do and assigns jobs".

16. The posting of the notice of the employee meeting and the Notice of Application for Certification were made on the same day. No evidence was adduced as to who posted the "steering committee" notice of the employee meeting to be held that same afternoon. Para 15 of the majority decision reveals the extraordinary direction in that notice that "all employees were to attend." Would a "steering committee" of the employees have authority to make such a direction for a meeting during working hours? It would be a preposterous presumption to say so.

Section 61 of the Act provides:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

The posting of the notice of the meeting by "a person" in the circumstances of this case, given the timing of the meeting and the authoritarian direction for all employees to attend, together with the pronouncements by those conducting the meeting, is in my opinion a violation of section 61 of the Act and I so find.

17. The majority decision (para. 44) see the ordering of a second vote as consistent with the majority decision in *Homeware Industries Limited*, [1981] OLRB Rep. Feb. 164. There are, however, significant differences of relevance when examining the central question of the probable state of mind of the employees who are voting for or against representation by an applicant trade union.

18. *Homeware Industries* operates several plants. The applicant trade union at the time had a collective bargaining agreement at the Downsview plant and was organizing another plant of the company at Beaverton. The Tottenham Plant of *Homeware* is the subject of the majority reference in their para 44. Before the votes at the Tottenham plant employees learned that:

- *Homeware* top management preferred the applicant trade union to an employees association.
- A rumoured closing of the Beaverton plant was untrue.

It is important to note that the application for certification in the *Homeware* case was not a pre-hearing vote application. The *Homeware* application, therefore, required an initial membership support of not less than 45 per cent, as is indicated in the majority decision of Board Member A. HersHKovitz favouring a 7a certification and no vote. In the instant case the initial membership support in the pre-hearing vote application is required to be not less than 35 per cent. It would be reasonable to assume that there would be a greater percentage of signed up union members at *Homeware* to start with, and thus a more committed and informed group would be voting. It must be clearly understood that in the *Homeware Industries* case there was but *one* vote; it was not the second vote situation the majority of this panel of the board consider to be consistent. In my opinion there is no consistency in following the *Homeware* case.

19. The Preamble of *The Labour Relations Act* calls for “collective bargaining between employers and trade unions”:

Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

The operative word in the Preamble is “encouraging”. Denial of a 7a certificate is not “encouraging the practice and procedure of collective bargaining”, as I understand it. In all of these circumstances I find it appropriate to certify the applicant *and* to issue the remedial order, absent only the requirement for the second vote as ordered by the majority.

The Labour Relations Act

1034

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION HAVE PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED SECTION 56 OF THE LABOUR RELATIONS ACT BY INTERFERING WITH THE FREE SELECTION OF THE INTERNATIONAL WOODWORKERS OF AMERICA BY PROMOTING A PLANT COMMITTEE OR EMPLOYEE ASSOCIATION TO THE DETRIMENT OF THE UNION.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE.

TO INSURE THAT A UNION WILL REFLECT EMPLOYEE WISHES, THE ACT REQUIRES THAT IT BE INDEPENDENT OF MANAGERIAL SUPPORT OR INFLUENCE. IF IT IS NOT IT CANNOT BE CERTIFIED TO REPRESENT EMPLOYEES.

WE ASSURE ALL OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THE RIGHTS LISTED ABOVE.

WE WILL NOT ENGAGE IN ANY CONDUCT WHICH INTERFERES WITH THE EMPLOYEES' FREE SELECTION, ORGANIZATION OR ADMINISTRATION OF THE INTERNATIONAL WOODWORKERS OF AMERICA.

WE WILL NOT PARTICIPATE IN THE FORMATION, IF ANY, OR ADMINISTRATION OF AN EMPLOYEE ASSOCIATION IN CONTRAVENTION OF THE ACT.

WE WILL PERMIT THE UNION TO HOLD A MEETING WITH ALL EMPLOYEES IN THE VOTING CONSTITUENCY, WITHOUT LOSS OF PAY, ON COMPANY PREMISES AND DURING WORKING HOURS AS ORDERED BY THE BOARD. THE UNION IS ENTITLED TO BRING A PORTUGUESE INTERPRETER TO THE MEETING.

WE WILL PERMIT THE UNION REASONABLE ACCESS TO THE BULLETIN BOARD COMMONLY USED TO POST MESSAGES TO EMPLOYEES UNTIL THE IMPOSITION OF THE SILENT PERIOD PRECEDING THE REPRESENTATION VOTE AS ORDERED BY THE BOARD.

WE WILL ALLOW THE EMPLOYEES THROUGH THE TAKING OF ANOTHER REPRESENTATION VOTE ORDERED BY THE BOARD TO FREELY DECIDE WHETHER OR NOT THEY WISH TO BE REPRESENTED BY THE INTERNATIONAL WOODWORKERS OF AMERICA.

IF THE MAJORITY OF EMPLOYEES VOTE IN FAVOUR OF THE INTERNATIONAL WOODWORKERS OF AMERICA AND THE BOARD CERTIFIES THE UNION AS THE EMPLOYEES' REPRESENTATIVE, WE WILL BARGAIN IN GOOD FAITH WITH THE UNION AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.

UPPER CANADIAN FURNITURE LIMITED

M.R. (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

Legislação de Relações de Trabalho

AVISO AOS EMPREGADOS

Afixo por Ordem da Direcção de Relações de Trabalho do Ontario

AFIXAMOS ESTE AVISO EM CONCORDANCIA COM UMA ORDEM DA ONTARIO LABOUR RELATIONS BOARD EMITIDA DEPOIS DUMA AUDIÊNCIA NA QUAL NÓS E A UNIÃO PARTICIPAMOS. A ONTARIO LABOUR RELATIONS BOARD ACHOU QUE NÓS VIOLAMOS O ARTIGO 56 DO LABOUR RELATIONS ACT, POR INTEFERIRMOS COM A LIVRE ESCOLHA DA INTERNATIONAL WOODWORKERS OF AMERICA, POR PROMOVERMOS UMA COMISSÃO NO LOCAL DE TRABALHO OU UMA ASSOCIAÇÃO DE OPERÁRIOS EM DETRIMENTO DA UNIÃO.

O ACTO DÁ OS SEGUINTES DIREITOS AOS EMPREGADOS:

ORGANIZAREM-SE A SI PRÓPRIOS;

FORMAR, ASSOCIAR E PARTICIPAR NAS ACTIVIDADES LEGAIS DUMA UNIÃO;

NEGOCIAR COMO UM GRUPO, ATRAVÉS DUM REPRESENTANTE DA SUA PRÓPRIA ESCOLHA;

AGIR CONJUNTAMENTE PARA UM CONTRACTO COLECTIVO;

RECUSAR A FAZER ALGUM OU TUDO DO ACIMA MENCIONADO.

PARA ASSEGURAR QUE O SINDICATO REFLECTA OS DESEJOS DOS TRABALHADORES, A LEI REQUERE QUE ESTE ESTEJA INDEPENDENTE DE INFLUÊNCIAS OU CONVIVÊNCIA DA ADMINISTRAÇÃO. SE NÃO FOR ASSIM, NÃO PODERÁ SER CERTIFICADO COMO REPRESENTANTE DOS TRABALHADORES.

NÓS ASSEGUAMOS A TODOS OS NOSSOS EMPREGADOS QUE:

NÓS NADA FAREMOS QUE INTERFIRA COM ESTES DIREITOS.

NÃO PARTICIPAREMOS EM CONDUTA ALGUMA QUE INTERFIRA COM A LIVRE ESCOLHA DOS EMPREGADOS, UMA ORGANIZAÇÃO ADMINISTRAÇÃO DA INTERNATIONAL WOODWORKERS OF AMERICA.

NÃO PARTICIPAREMOS NA FORMAÇÃO OU ADMINISTRAÇÃO DUMA ASSOCIAÇÃO DE EMPREGADOS EM CONTRAVENÇÃO DO ACTO.

DARIAMOS AUTORIZAÇÃO AO SINDICATO PARA PROMOVER UMA REUNIÃO COM TODOS OS TRABALHADORES DENTRO DO CÍRCULO ELEITORAL, SEM PERDA DE SÁLARIOS, DENTRO DA PROPRIEDADE DA COMPANHIA E DURANTE AS HORAS DE SERVIÇO, DE ACORDO COM AS INSTRUÇÕES DA DIRECÇÃO DAS RELAÇÕES DO TRABALHO DO ONTÁRIO (ONTARIO LABOUR RELATIONS BOARD). O SINDICATO TEM O DIREITO DE TER PRESENTE UM INTERPRETE DE PORTUGUÊS.

PERMITIREMOS À UNIÃO, ACESSO À PAUTA GERALMENTE USADA PARA AFIJO DE MENSAGENS PARA OS EMPREGADOS ATÉ À IMPOSIÇÃO DO PERÍODO DE SILÊNCIO QUE PROCEDE A REPRESENTAÇÃO DE VOTO COMO ORDENADO PELA BOARD.

AUTORIZAREMOS AS EMPREGADOS A VOTAREM DE NOVO DE ACORDO COM A ORDEM DA BOARD PARA DICIDIREM LIVREMENTE SE DESEJAM OU NÃO SEREM REPRESENTADOS PELA INTERNATIONAL WOODWORKERS OF AMERICA.

SE A MAIORIA DOS EMPREGADOS VOTAR A FAVOR DO "INTERNATIONAL WOODWORKERS OF AMERICA", E A DIRECÇÃO DA RELAÇÕES DO TRABALHO (ONTARIO LABOUR RELATIONS BOARD) CERTIFICAR O SINDICATO COMO REPRESENTANTE DOS TRABALHADORES, NEGOCIAREMOS DE BOA FÉ COM O SINDICATO E FAREMOS TODOS OS ESFORÇOS POSSÍVEIS PARA CONSEGUIR UM ACORDO COLECTIVO.

UPPER CANADIAN FURNITURE LIMITED
POR: (REPRESENTANTE AUTORIZADO)

**Este é um aviso oficial da Direcção e não pode ser retirado
ou desfigurado**

Este aviso permanecerá afixo durante 60 dias úteis consecutivos.

DIA 16 DE JULHO DE 1981.

0549-81-R Seafarers' International Union of Canada, AFL-CIO-CLC, Applicant, v. **Wakeham & Son Ltd.**, Respondent, v. Local 401 — Canadian Maritime Union Canadian Brotherhood of Railway Transport & General Workers, Intervener, v. Group of Employees, Objectors

Constitutional Law – Employees on tug-boats and fuel barges – Whether integral part of navigation and shipping

BEFORE: R.D. Howe, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

***APPEARANCES:** Martin Levinson, David Cote and William Ross for the applicant; Thomas A. Stefanik, Michael Gordon and Wayne Wakeham for the respondent; Rick Beckwith and Jim Todd for the intervener; Timothy Dufresne and Joseph Goyetch for the objectors.*

DECISION OF THE BOARD; July 27, 1981

1. This is an application for certification in which the applicant seeks to be certified as the bargaining agent for the following unit:

“All employees [of the respondent] working aboard [its] tugs at the port of Hamilton, Ontario, excluding Captains, Mates, Engineers, Management and office employees.”

2. In its reply to the application, the respondent submitted that the Board “has no jurisdiction in this matter as it is one that comes within the exclusive jurisdiction of the Canada Labour Relations Board pursuant to the provisions of Section 91(10) of The British North America Act.”

3. There was filed with the Board on behalf of the intervener a certificate issued by the Canada Labour Relations Board on February 1, 1977 by which the intervener was certified as the bargaining agent for “all unlicensed personnel employed aboard the ships operated by Wakeham & Son Limited.” The representatives of the intervener advised the Board that it had subsequently entered into a collective agreement with Wakeham Shipping Ltd. It was common ground among the parties that Wakeham Shipping Ltd. and the respondent, Wakeham & Son Ltd., are separate legal entities. Counsel for the applicant advised the Board that his client seeks bargaining rights only with respect to the respondent, Wakeham & Son Ltd., and does not seek bargaining rights with respect to Wakeham Shipping Ltd. Counsel for the respondent advised the Board that the respondent is not alleging that there exists any collective agreement which bars the present application. The representatives of the intervener stated that the intervener does not claim bargaining rights with respect to any employees of the respondent, and further advised the Board that the intervener has abandoned any bargaining rights which it may have had with respect to such employees by virtue of the aforementioned certificate since it has not represented any employees of the respondent since June of 1978. The representatives of the intervener indicated that their only purpose in attending the hearing was to advise the Board of their existing bargaining rights with respect to Wakeham Shipping Ltd. Having been assured by the other parties to this application that the application does not

affect Wakeham Shipping Ltd. or any of its employees, the representatives of the intervener withdrew from the hearing.

4. At the hearing of this matter on June 26, 1981, the Board heard evidence and argument on the constitutional issue raised by the respondent.

5. The respondent owns three vessels, commonly referred to as “tugs” — the Princess #1, the Jenny T #2 and the R & L #1. The respondent uses those vessels at various times to push and tow barges and, in particular, to push the “fuel barge” described below; to dock ships; to provide supplies to seismic operations in Lake Erie and to tend buoys off the coast of Newfoundland (for a company whose primary concern is seismic testing for gas and oil). Although the respondent’s corporate charter empowers it to engage in dredging activities, it has never actually done so.

6. The respondent acquired the Princess #1 approximately four years ago. Prior to 1981, she “pushed a fuel barge in the Port of Hamilton”, towed and docked ships, and provided supplies to a “gas company” engaged in seismic work on Lake Erie. Deck-hand Grant Daniels testified that during 1979, the Princess #1 “was on Lake Erie supplying supplies to the gas company during the summer months, . . . towed two scows up the St. Clair River . . . [and] made the odd trip to Oshawa to dock some ships.” In 1980, she made a towing trip to Quebec City and also went to Cleveland, Ohio, to tow a barge (with a crane on it) from there to Oshawa, Ontario. However, she has never had any “regular schedule . . . for leaving Ontario” and has done so only on a sporadic basis. She spent a “substantial amount” of her time in 1980 pushing the fuel barge in the Port of Hamilton. In 1981, the Princess #1 has worked exclusively “on the fuel barge in the Port of Hamilton”. In this role, she pushes the “Shell Oil fuel barge” out to ships in the Hamilton harbour which require fuel. The ships in question can “come and go from anywhere to anywhere”. Although the evidence does not indicate what proportion of the ships fuelled by the barge arrive from or travel to places beyond the Province of Ontario, it is clear that many of them are “salt water, deep sea ships” engaged in international shipping. Wayne Wakeham, an agent of the respondent (who is “contracted to the Company to look after administrative problems and employee problems”), agreed during cross-examination by counsel for the applicant that the Shell Oil fuel barge is “like a gas station for fuelling ships”.

7. The Jenny T #2 was purchased by the respondent in 1969. Prior to 1981, she pushed the aforementioned fuel barge in the Port of Hamilton in the manner described above. Since the beginning of 1981, she has been “tied up” in the Port of Hamilton and has not been used at all.

8. The R & L #1 was purchased by the respondent in 1979. The respondent sent it down the St. Lawrence River to “pick up a ferry” in the east and tow it to Oshawa. However, she “only got as far as Montreal [because she] didn’t have enough power to get up the river”. As of the date of the hearing of this matter, she was “on her way to the east coast off the coast of Newfoundland to tend buoys” until October, pursuant to a contract between the respondent and a company whose primary concern is seismic testing for oil and gas. Earlier in the year, she performed a “towing job” by going to Port Colborne, Ontario, and “taking on the line of a ship”. She also was used “two or three times” for docking ships at a dry dock in the Port of Hamilton. During 1980, the R & L #1 was primarily engaged in providing oil and other supplies to oil and gas rigs in Lake Erie, although she also did some towing and docking of ships. In response to a question by Board Member Ronson, Mr. Wakeham stated that while

the R & L #1 is working off the coast of Newfoundland, future requests for docking assistance will be accommodated by sending the Princess #1.

9. The evidence indicates that the operation of the respondent's three vessels is governed to a large extent by Federal legislation and regulations. For example, the maritime mobile radios on the ships are licenced by the Department of Communications of the Government of Canada and the Ships' radiotelephone installations are inspected by Transport Canada; Canada Customs has issued a "coasting licence" for the Princess #1 by which its owner is "authorized to transport duty-paid or Canadian goods for hire or reward and passengers between Canadian ports without reporting to Customs; the Canada Department of Transport has issued an Inspection Certificate in respect of the Princess #1 by which it is certified, *inter alia*, that the ship "has been duly inspected in accordance with the provisions of the *Canada Shipping Act*" and that the ship is "fit to ply as an Inland Waters Towboat"; the persons who serve as "captains" on the ships are licenced by the Canadian Coastguard and are governed by the *Canada Shipping Act*; and each of the three ships is "registered in Canada under the Canadian flag".

10. Counsel for the respondent contended that the extensive regulation of the Company's operations by the Federal Government precludes the Board from assuming jurisdiction over it. However, the labour relations of an employer who operates ships may be within provincial jurisdiction despite the existence of federal licencing and inspection requirements and other forms of federal regulation with respect to its vessels (see, for example, *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673 (Ont. C.A.)). It was also contended on behalf of the respondent that the fact that it is empowered by its charter to engage in dredging is relevant to the determination of whether the respondent falls within provincial or federal labour law jurisdiction. However, the Board cannot accept that submission as it is not what an employer is authorized to do, but what it actually does, which governs the determination of the jurisdiction under which it falls (see *Re Tank Truck Transport Ltd.*, [1960] O.R. 497, at 502 (H.C.); *R. v. Manitoba Labour Board Ex parte Invictus Ltd.* (1967), 65 D.L.R. (2d) 517, at 526 (Man. Q.B.); *The Letter Carriers' Union of Canada v. Canadian Union of Postal Workers and M & B Enterprises Ltd.*, 73 CLLC ¶14,190; [1975] 1 S.C.R. 178 (S.C.C.); *Ottor Freightways Limited*, [1975] OLRB Rep. Jan. 1; and *Windsor Airline Limousine Service Limited*, [1980] OLRB Rep. Feb. 272; application for judicial review dismissed (1981), 30 O.R. (2d) 732 (Div. Ct.); leave to appeal denied, September 15, 1980.

11. It was submitted on behalf of the respondent that its operations fall squarely within section 92(10) of the *British North America Act* (hereinafter referred to as the "B.N.A. Act"), which enumerates "Navigation and Shipping" as one of the classes of subjects over which Parliament has legislative jurisdiction. Counsel also suggested that section 91(29) read in conjunction with section 92(10) might be relevant to the determination of this matter. Section 92(10) provides as follows:

"In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,—

...

10. Local Works and Undertakings other than such as are of the following Classes:—

- (a) Lines of Steam or other Ships, Railways, Canals, telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;
- (b) Lines of Steam Ships between the Province and any British or Foreign Country;
- (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the advantage of Two or more of the Provinces."

Section 91(29) make it clear that classes of subjects expressly excepted from provincial jurisdiction, such as the classes of subjects listed in parts (a), (b) and (c) of section 92(10), are within the exclusive authority of Parliament (see *Underwater Gas Developers Ltd.*, *supra* at 677-678, and *Invictus*, *supra*, at 522).

12. *Prima facie* the regulation of contracts of employment, hours of work, minimum wages and other aspects of employment law, including labour relations, is a matter of "Property and Civil Rights in the Province", within the meaning of section 92(13) of the B.N.A. Act and is, accordingly, within the jurisdiction of the provincial legislatures (see *Toronto Electric Commission v. Snider*, [1925] 2 D.L.R. 5 (J.C.P.C.); *Re Northern Electric Company Limited*, 63 CLLC ¶15,484; and *Windsor Airline Limousine Services Limited*, *supra*). However, there is also a sphere of federal labour law jurisdiction in respect of employees of employers who are engaged in enterprises that are within federal jurisdiction, such as those set forth in section 91(10) and in parts (a), (b) and (c) of section 92(10) of the B.N.A. Act. Accordingly, Parliament has enacted legislation that governs labour relations in federal areas of activity. Section 108 of the *Canada Labour Code*, R.S.C. 1970, c.L-1, as am., provides:

"This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers."

13. In *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1, at 13 (S.C.C.) Dickson J. stated (in delivering the unanimous judgment of the Court):

"The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's *Canadian Constitutional Law*, 4th ed. (1975), p. 363:

In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional competence; and,

secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate industry or enterprise...

In an elaboration of the foregoing, Mr. Justice Beetz in *Montcalm Construction Inc. v. Minimum Wage Com'n et c.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1, set out certain principles which I venture to summarize:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity."

See also *Windsor Airline Limousine Services Limited*, *supra*, at paragraph 25, in which the Board stated:

"Regulatory control of labour relations on a federal level can be exerted only in respect of activities which fall within federal authority by specific reference, (see *Eastern Canada Stevedoring Limited*, [1955] S.C.R. 529; [1955] 3 D.L.R. 721), by reference to the federal general or residuary power (See *Pronto Uranium Mines Ltd. and Algoma Uranium Mines Limited v. Ontario Labour Relations Board*, [1956]

O.R. 862; 5 D.L.R. (2d) 341;), by the exercise of federal authority by a declaration under section 92(10)(c) of the B.N.A. Act, or by direct relation to federal government operations and federal Crown enterprises, (see Reference Re Legislative Jurisdiction Over Hours of Labour, [1925] S.C.R. 505; [1925] 3 D.L.R. 1114)."

14. It was common ground in the instant case that if the respondent's operations fall within federal labour relations jurisdiction, they do so by virtue of the provisions of section 91(10) or section 92(10) (read in conjunction with section 91(29) of the B.N.A. Act.

15. Section 91(10) of the B.N.A. Act gives Parliament jurisdiction over "Navigation and Shipping". In *City of Montreal, v. Montreal Harbour Commissioners*, [1926] 1 D.L.R. 840 (J.C.P.C.), Viscount Cave, L.C., stated (at page 848) that "there is no doubt that the power to control navigation and shipping conferred on the Dominion by section 91 is to be widely construed". One of the leading constitutional cases with respect to the scope of the federal "Navigation and Shipping" power is *Reference re Validity of Industrial Relations and Disputes Investigation Act (Can.), and Applicability in Respect of Certain Employees at Eastern Canada Stevedoring Co. Ltd.*, [1955] 3 D.L.R. 721 (S.C.C.). That Reference involved a stevedoring company which supplied stevedoring and terminal services to seven shipping companies in the ports of Halifax, St. John, Montreal, Mont Lewis, Rimouski and Toronto, for the loading and unloading of ships of those companies operating on regular schedules between ports in Canada and ports outside Canada. The majority of the nine individual judgements rendered in that case ruled that the stevedores and office staff employed by the company at the port of Toronto were subject to the federal *Industrial Relations and Disputes Investigation Act* and not to *The (Ontario) Labour Relations Act* in their employment relations with the company. The members of the Court adopted a variety of terms to express the rationale for that conclusion. Kerwin C. J. concluded that stevedores work was "intimately connected" with shipping and that they were "part and parcel of works in relation to which the Parliament of Canada has exclusive jurisdiction to legislate" (pages 730-732). Estey J. found the work of the stevedores to be an "integral part" of or "necessarily incidental" to the (interprovincial) steamship lines operated by the seven shipping companies, since the loading and unloading of the freight transported by those ships was "necessary to the successful operation of the steamships lines" (page 759). Locke J. (who dissented with respect to the majority finding that the office employees in question were within federal labour law jurisdiction) agreed with the majority that the stevedores were covered by federal labour law since "the loading and unloading of cargo are part and parcel of the activities essential to the carriage of goods by sea". He therefore concluded that "legislation for the regulation of the relations between [stevedores and their employers] is, in pith and substance, legislation in relation to shipping" (page 768). Taschereau J. stated (at page 737): "The transportation of goods by water by means of ships, is an operation entirely dependent on the services of stevedores of the Company and both are so closely connected that they must be considered as forming part of the same business."

16. The approach which has generally been adopted by the Courts (and by labour relations boards) in determining constitutional issues such as those raised in the present case was aptly summarized by Paul C. Weiler as Chairman of the British Columbia Labour Relations Board in *Arrow Transfer Company, Ltd.*, 74 CLLC ¶16,130, at 1079-1080:

"They [the Courts] begin with the operation which is at the core of the

federal undertaking (e.g. railway, shipping, or the postal service). They then look at the particular subsidiary operation engaged in by the employees whose collective bargaining is in question and reach a judgment about the relationship of that operation to the basic federal undertaking. The judges have used a variety of terms to characterize the part the particular operation may play in the over-all enterprise. It must have a 'vital', 'essential', 'integral', 'important', or 'intimate' role in the undertaking if it is to fall within the jurisdiction of Parliament. As was said earlier, that has been the conclusion about the relationship of stevedoring to shipping and of mail pick-up to the postal service; the opposite conclusion was reached regarding the relationship of a hotel to the railroad. In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure of the employment relationship."

In the *Northern Telecom* case, *supra*, at 14, the Supreme Court of Canada described that passage as "a useful statement of the method adopted by the Courts in determining constitutional jurisdiction in labour matters".

17. In the instant case, the "core of the federal undertaking" is (extraprovincial) shipping. The crucial issue is the proper characterization of the part which the respondent's "subsidiary operation" plays in that overall enterprise. That issue has presented the Board with some difficulty as this is a "border line" case.

18. If the respondent's operation was confined to the activity (carried on by the Princess #1 during 1979 and the R & L #1 during 1980) of carrying supplies on its vessels from the mainland to seismic operations on Lake Erie, it would be relatively clear on the basis of the Ontario Court of Appeal decision in *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board*, *supra*, that the respondent in its relations with its employees would be subject to *The Labour Relations Act* and not to the *Canada Labour Code*; although those operations involve some "navigation" and some "shipping", those activities would be strictly incidental and subordinate to a totally different activity and undertaking, namely, seismic activities carried out with a view to determining appropriate locations for gas well sites (see, in particular, page 681 of *Underwater Gas Developers Ltd.*). However, other aspects of the respondent's operation have a much closer nexus with navigation and (extraprovincial) shipping.

19. A recent decision of the British Columbia Labour Relations Board provides some insight into where the Courts and labour boards have drawn the line between federal and provincial labour law jurisdiction with respect to services rendered in relation to "Navigation and Shipping". In *Tymac Launch Service Ltd.*, 81 CLLC ¶16,072, that Board was faced with a constitutional challenge to its jurisdiction over an employer which operated a launch service that supplied transportation services to anchored ships (including "water taxi" services by which customs officers, pilots and crew members were transported to and from ships) waiting for berths to become available at which they could dock. At pages 14,636 and 14,637, the Board stated:

"The role of Tymac [the employer in question] must be viewed in the

context of the shipping industry and ancillary services. The core federal undertaking is shipping. That is, undoubtedly, within the sphere of federal legislative competence. In addition, it has been determined that the pilots who must necessarily guide ships in and out of port are subject to federal legislation in respect of labour relations. Similarly, the tow boat industry has been held to be an essential aspect of shipping and, therefore falling within federal legislative competence. At berth, the loading and unloading of cargo has been held to be an essential aspect of shipping and, therefore, within federal legislative competence (see the *Stevedoring Reference, supra*).

All of these activities are essential to shipping and shipping could not be carried on without any one of them.

In contrast to those subsidiary operations which have been held essential to the shipping industry, there are several operations which, while they *service* the shipping industry, are not considered to be essential to it. The business of ships chandelers supplies food stuffs and other products to ships in port. The employees of ships chandelers are treated as being within provincial legislative competence in the province of British Columbia.

The repair of ships is carried out by drydock and repair operations in the port of Vancouver. The employees of these operations are provincially certified.

In my view, the operation of Tymac falls more closely within the type of functions performed by ships chandelers and ships repair services. These sorts of services are incidental to the operation of shipping. Without them, shipping could exist and could go on at some inconvenience, but it could go on. It cannot be said that Tymac's launch operation is an 'essential' or 'vital' part of the operation of shipping. In the absence of a service such as Tymac's, the ships crews would find other ways of reaching shore, for example, by the use of the ships' own equipment, (and those persons coming on board from shore would have to find alternative means of reaching the ships). While this may involve delay, inconvenience, and added expense to the shipping operation, it is by no means 'essential' to that operation."

20. Provincial labour law legislation is applicable to shipping undertakings whose operations are carried on entirely within the boundaries of a single province (see, for example, *Finlay Navigation Limited*, 78 CLLC ¶16,143, in which the Canada Labour Relations Board held that it had no jurisdiction with respect to personnel employed on tug boats which towed logs on an inland waterway entirely within the province of British Columbia). Provincial jurisdiction is not ousted by the fact that vessels used in such undertakings occasionally travel beyond the boundaries of the province (see *Agence Maritime Inc. v. Canada Labour Relations Board* (1969), 12 D.L.R. (3d) 722 (S.C.C.), in which the appellant owned and operated three ships which transported merchandise along the St. Lawrence River within the boundaries of Quebec, and which had travelled beyond the territorial limits of Quebec "only on three

occasions, by way of exception" within the three year period preceding the application for certification). In *Royal Hydrofoil Cruises (Canada) Limited*, [1980] OLRB Rep. Sept. 1322, the Board relied upon the *Agence Maritime* case to conclude that it had jurisdiction over the labour relations of a company which transported passengers by ship between Toronto and Niagara-on-the-Lake along a route which ran for approximately half its length through U.S. waters in Lake Ontario.

21. In *North Shore Supply Co. Ltd.*, [1974] OLRB Rep. July 446, the Board was called upon to decide whether it had jurisdiction over employees of a "Ship Chandler" in Thunder Bay. The respondent in that case engaged solely in supplying ships with provisions (such as produce, meats, vegetables, hardware and ropes) necessary for the day to day functioning of the ships and their crews. The provisions were supplied as needed on a continuous (24 hours per day, 7 days per week) basis by the respondent from its warehouse in Thunder Bay. Approximately ninety-five per cent of the respondent's business related to ships whose operations extended beyond Ontario. The respondent provided its services to approximately seventy-five per cent of the ships coming into the Thunder Bay area. After reviewing the applicable jurisprudence, the Board concluded that it had jurisdiction to entertain an application for certification of the respondent's employees because "the operations consisting of 'Ship Chandler' services as provided by the respondent are not an integral part, nor are they necessarily incidental to the federal undertaking of 'Navigation and Shipping'". The Board characterized the "Ship Chandler" services as a "convenience" (at paragraph 8):

"In our opinion, the characterization of 'convenience' would also apply to the respondent's operations and although we are satisfied that, without its intervention, there could be some delay occasioned in the stocking of these ships with provisions essential for their voyages, that factor of itself would not render such operations an integral or necessary part of the federal undertaking of 'Navigation and Shipping'."

22. If the activities of the respondent's tugs were confined to pushing the fuel barge in the Port of Hamilton, the respondent's operation might, by analogy to the *North Shore* case, be within the jurisdiction of the Board, although we would have some hesitation in characterizing the provision of fuel that is essential to the continued operation of a number of the ships in the Port of Hamilton which regularly travel beyond Ontario, as being a mere "convenience" associated with such shipping. The aquatic supply of fuel to such ships, without which they could not operate, appears to us to be distinguishable from the types of services which have been found in the case law to be mere "conveniences" associated with federal undertakings, such as hotel services provided by a railway for the convenience of its passengers (*Canadian Pacific Railway Company and A.G. for B.C. and A.G. for Canada*, [1950] A.C. 122 (J.C.P.C.)), services provided by baggage porters to airline passengers up to the time their baggage is given to the airline prior to departure and immediately after their baggage is returned by the airline after landing (*Murray Hill Limousine Services Ltd. v. Sinclair Batson*, 66 CLLC ¶14,143 (Que. Ct. Q.B.)), and ground transportation services provided to and from Toronto International Airport (*Re Colonial Coach Lines Ltd. and Ontario Highway Transport Board* (1967), 62 D.L.R. (2d) 217 (O.H.C.)). Accordingly, we would be more inclined to characterize the fuelling service provided by the respondent as being intimately connected with, an integral part of or necessarily incidental to the (federal) shipping undertaking which it serves, by analogy to the *Stevedores Reference*, *supra*. However, it is unnecessary for the Board to express a final view on that matter in the instant case since the

fuelling service provided by the respondent is only part of its normal activities as a going concern. The respondent's operations also include docking ships, which appears to the Board to be an essential part of the "navigation" of those ships since (presumably) they could not be docked without such assistance; towing vessels extra-provincially; and tending buoys off the coast of Newfoundland. When those activities are viewed as a whole, it appears to the Board that the respondent's tug boat operations are an integral part of or necessarily incidental to the "Navigation and Shipping" undertakings operated by many of the customers to which the respondent provides its varied aquatic services. Viewed as a whole, the respondent's operations appear to the Board to be as essential to those Federal undertakings as were the services provided by an aircraft ground service company in *Butler Aviation of Canada Limited, v. International Association of Machinists and Aerospace Workers et al.*, 76 CLLC ¶14,008 (Fed. C.A.) in which it was held that the Canada Labour Relations Board properly decided that it had jurisdiction over an employer which provided re-fuelling, hanger parking, baggage handling and passenger lounge facilities for private planes and some regularly scheduled flights of certain commercial airlines at Montreal International Airport. In his judgment on behalf of the Court, Hyde D. J. stated (at page 41)

"... If one uses [the company's General Manager's] general description of the service supplied by his company — 'a gas station' for aircraft — it is difficult to conceive how the customers it services could operate their planes or their businesses of transportation by air without those services, whether provided by it or by someone else.

What we have to consider in this case is whether a particular local operation is an 'integral part of, or necessarily incidental' (in a practical and commercial way) to an operation within federal legislative jurisdiction. ...

Obviously there is no clear cut test that can be applied in each instance. However, I consider that the re-fuelling of an aircraft between flights is obviously 'necessarily incidental' to its operation as is the general servicing that the [company] provides. ..."

Although the respondent's ships do not travel outside of Ontario on a regularly scheduled basis, it appears that one or more of them has done so in each of the past three years as the need has arisen. It is difficult to characterize that aspect of the respondent's operation as "casual" when one of the two active vessels for whose crews the applicant claims bargaining rights, is so engaged at the time of the application and will continue to be so engaged for a substantial period of the 1981 navigational season. (In response to a question by the Vice-Chairman, Mr. Levinson indicated that the applicant seeks bargaining rights in respect of the R & L #1, in addition to the tug currently operating in the Port of Hamilton. Presumably it is the intention of the applicant to seek leave of the Board to amend the description of the requested bargaining unit accordingly.) Moreover, employees need not be *exclusively* employed upon or in connection with a federal work or enterprise to come within federal labour law jurisdiction (see *M & B Enterprises Ltd.*, *supra*).

23. The respondent's ships can and do travel far beyond the Province of Ontario as part of its normal undertaking. Thus, deckhands employed by the respondent in the Port of Hamilton one day, may find themselves en route to Ohio, Quebec or New foundland the next

day. It would not foster harmonious labour relations or promote sound collective bargaining to have such employees subject to a certificate of this Board one day, and subject to no certificate, or perhaps to a certificate issued by the Canada Labour Relations Board, the next day, depending upon the location of the vessel. Assumption of jurisdiction by this Board with respect to the employees in the bargaining unit applied for in this case might result in a situation in which such employees could from day-to-day be shifted from provincial to federal jurisdiction for the purposes of such matters as certification, collective bargaining, and various terms and conditions of employment. When faced with a similar prospect as a result of an argument advanced on behalf of a construction company engaged in building an airport runway, Beetz J. stated (in *Montcalm Construction Inc. v. Minimum Wage Commission et al.*, 79 CLLC ¶14,190 (S.C.C.), on behalf of the majority): "I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion." We respectfully share his view that such bifurcation of a company's labour relations is unworkable and is not dictated by the B.N.A. Act. The distinct possibility of such an unworkable situation fortifies the Board's conclusion that the respondent's tug boat operations are governed in their entirety by the *Canada Labour Code*, not by *The Labour Relations Act*.

24. For the foregoing reasons, this application is hereby dismissed.

0083-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. Wells Fargo Armcar, Inc., Respondent.

Security Guard – Whether drivers and messengers of security company guards – Definition of guard considered

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H: J. F. Ade and C. Ballentine.

APPEARANCES: Douglas J. Wray, Harry Bodkin and Paul Ostram for the applicant; W. G. Phelps and T. Bradley for the respondent.

DECISION OF VICE-CHAIRMAN N. B. SATTERFIELD AND BOARD MEMBER C. A. BALLENTINE; July 27, 1981

1. The name of the respondent is amended to read: "Wells Fargo Armcar, Inc."
2. This is an application for certification in which the Teamsters Local Union No. 419 ("the union") is seeking to be certified as bargaining agent for a unit of employees of Wells Fargo Armcar, Inc. ("the employer") which the union describes in the following terms:

All employees, save and except supervisors and persons above the rank of supervisor, who work as Vaultmen, Messengers, Drivers and Guards for the employer out of its Toronto areas office.

The employer contends that its employees who would be included within that description are guards within the meaning of section 11 of *The Labour Relations Act* which states as follows:

“The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers’ organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.”

3. The employer further contends that the union is not eligible to represent these employees who are guards because it is a “. . . trade union [which] admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.”. Counsel for the union takes the position that the Board has consistently restricted the application of section 11 to situations where there is an actual or potential conflict of interest between the employees who are guards.

4. The employees affected by this application were represented in collective bargaining for nearly ten years by a union which represents guards only. These bargaining rights were terminated in March 1981 following a representation vote. Now these employees seek to be represented by the applicant herein. In 1972, Teamsters Local Union No. 91 applied to be certified for a similar group of employees at the employer’s Ottawa location. The Board at first certified Local 91 to represent the employees and then, on reconsideration of its decision, found the employees to be guards within the meaning of section 11 of the Act. The Board also found Local 91 not eligible to represent guards and dismissed the application. See *Wells Fargo Armoured Express, Ltd.*, [1972] OLRB Rep. Jan. 22. Counsel for the employer in the instant application claims that there is no essential difference between the work being performed by the employees affected by this application and that which was performed by the employees in Ottawa.

5. The employer’s business in which the persons affected by this application are employed involves the transferring of valuables under protection. This protection is provided by persons licensed under provincial authority as security guards who carry sidearms, by the use of armoured cars which are specifically constructed as to their armouring and locking systems and by the employer’s own security vaults. The employer may occasionally use an ordinary rented vehicle for the transporting of valuables, but this is done primarily in the armoured vehicles. The persons whom the employer refers to as security guards are classified as driver-guards, messenger-guards and vaultmen. Driver-guards and messenger-guards form the normal two man crew on the armoured vehicles. Occasionally a vehicle crew includes a third person. The truck crews pick up and deliver valuables from the employers’ customers. Driver-guards and messenger-guards are at all times responsible for the security of their vehicles and are jointly responsible for the employer’s property and that of its customers. Each crew selects the route to be used for each day’s pick-ups and deliveries. The messenger-guards are responsible for the delivery or pick-up of valuables at the customers’ premises. Each driver-guard is responsible for the safe operation of his vehicle at all times and for covering the messenger-guard when he is outside of the vehicle and within view of the driver-guard. The employer’s customers consist of banks and other financial institutions, retail stores and other businesses which require this kind of protection for the transportation of valuables. The

picking up and delivering of valuables is done in sealed bags. The messenger-guard is responsible for delivering these sealed bags to or picking them up from an authorized employee of the customer. The guard signs for the receipt of valuables being picked up and obtains the employee's signature for the valuables being delivered.

6. The vaultmen receive and disburse valuables at the employer's premises and are responsible for protecting these valuables while they are in the employer's vault. One or two of the vaultmen may, from time to time, go out on the armoured vehicles as part of the vehicle crew.

7. The Board, prior to there being any statutory provision in respect of guards, was called upon to deal with the relationship between persons whose duties included protection of an employer's property and other employees of the employer. In *Canadian Westinghouse Co. Limited* 47 CLLC ¶16,492 the Board dealt with an application for certification for a proposed bargaining unit consisting of watchmen. While the Board found that these watchmen were employees within the meaning of the prevailing legislation and that the proposed bargaining unit comprised only of watchmen was appropriate for the purposes of collective bargaining, the Board refused to certify the applicant. It did so because the watchmen would have been represented in collective bargaining by the local of the applicant which already represented a unit of production employees and the effect of the certification would be an enlarging of the existing bargaining unit to include the watchmen. The Board considered this to be an inappropriate result because of the special nature of the watchmen's responsibilities to their employer.

8. The first statutory provision was introduced in 1950 and stated that:

"The Board shall not include in a bargaining unit with other employees any person employed as a guard to protect the property of his employer and no trade union shall be certified as bargaining agent for a bargaining unit of such guards if it admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than such guards."

This provision was further amended in 1954 to provide that:

"The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of his employer and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person employed as a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly with an organization that admits to membership persons other than such guards."

That provision was amended in 1970 so that the phrase "... to protect the property of his employer, ..." was replaced by the phrase "... to protect the property of an employer, ..." as it now appears in section 11 set out in paragraph 2 above. (emphasis added)

9. The Board's approach to the statutory provision covering guards is typified in its decision in *Geo. A. Crain & Sons Ltd.*, 63 CLLC ¶16,291 wherein at p. 1209 it said:

“In all events, to be considered guards as contemplated by the legislation, their duties must be of such a nature that inclusion in a bargaining unit with non-guard employees would confront them with a real and serious conflict between their special duties to their employer to protect his property and their expected loyalty to fellow bargaining unit employees.”

In a subsequent decision, *Knight Security Guards Limited*, [1968] OLRB Rep. Sept. 580, the Board construed the statutory provision broadly to include guards protecting property of third party employers. The Ontario High Court and the Ontario Court of Appeal [(1969) 4 D.L.R. (3d) 485 and (1969) 5 D.L.R. (3d) 707, respectively] disagreed with this broad construction but refused to quash the Board's decision. The Act was subsequently amended in 1970, as referred to above in paragraph 8, by replacing the words “his employer” with the words “an employer”. That amendment removed any doubt as to whether the statutory provision (now section 11 of the Act) applies to all guards, whether they protect the property of their own employer or that of a third party employer.

10. The Board's jurisprudence since that amendment reveals that, with one clear exception, it has consistently looked to a conflict of interest, actual or potential, between the guards and employees of the employer whose property the guards had a duty to protect as the basis for applying section 11 and its predecessor provisions. See for example the Board's decision in *Pal-O-Pak Manufacturing* [1978] OLRB Rep. Jan. 95, wherein the Board said at p. 96:

“5. Numbers of employees may have as some part of their responsibilities a duty to protect the property of their employer. Indeed, that is to some extent a duty normally devolving on all employees. (See, generally, Batt, *Law of Master and Servant*, p. 208 et seq.). Not all employees with some responsibility to protect the property of their employer will, however, fall within the definition of “guard” within the meaning of section 11 of the Act. As the Board's decisions have indicated one of the concerns of that section is the exclusion from a bargaining unit of guards whose duties and responsibilities would place them in a position of conflict between the interests of their employer and the interests of their fellow employees in the bargaining unit. (*George A. Crain & Sons Ltd.* 63 CLLC ¶16,291, *Disposal Services Limited* [1974] OLRB Rep. Feb. 84).”

The Board's decision in *The Art Gallery of Ontario*, Board file no. 0328-78-R unreported, a decision which issued October 30, 1978 saw the issue before it as “. . . whether the security staff of the Art Gallery of Ontario are by virtue of their duties placed in that kind of conflict of interest.” After a review of the evidence, the Board went on to state at paragraph 17, “Having regard to the evidence, this Board is satisfied that the security staff employed by the respondent would be in a sufficient conflict of interest vis-a-vis the bargaining unit employees to be “guards” within the meaning of section 11 of *The Labour Relations Act*.”

11. The one exception in the Board's jurisprudence is *Wells Fargo Armoured Express, supra*. In that case, the Board, without addressing the question of whether there was an existing or potential conflict of interest, found that the persons in question were “. . . primarily employed as a guard to protect the property of an employer.” and, therefore, were guards within the meaning of section 11 of the Act. It would appear from the absence of any reference that neither party raised an issue of conflict.

12. A more recent decision of the Board in *Metropol Security Limited*, [1980] OLRB Rep. Dec. 1755 deals with three distinct categories of employees and, without direct reference to whether there was an existing or potential conflict of interest, the Board found employees in one category to be guards within the meaning of section 11 and employees in the other two categories not to be guards within the meaning of that section. While it might appear that this decision, because of its lack of reference to conflict of interest, represents a departure by the Board from its earlier reliance on the conflict of interest test, the Board does not view it that way. The various references in the *Metropol, supra*, decision to the significance of whether the persons were employed as guards to protect the property of an employer as employer indicate the Board's continued concern with the potential for conflict of interest between guards and other employees of an employer. For example, at paragraph 11 the Board, in referring to the category of airport security guards, states:

"... It can be argued that their function is to protect aircraft and passengers in aircraft from hijacking. Insofar as the airlines are employers, it might be said that they are protecting the property of an employer. However, such an interpretation would strain the plain language of section 11, clearly this section reads "employed as a guard to protect the property of an employer" and does not read, for instance, "employed as a guard to protect the property of a person". The term "employer" as used in section 11 brings into play the employment relationship, that is, the guard protecting the property of an employer as employer. The security guards at the airport do not protect the property of the airlines as employers but rather they protect the property of the airlines from hijackers. Therefore, they are not guards within the meaning of section 11."

13. Counsel for the employer argues that the statutory language of section 11 is clear, unambiguous and makes no mention of conflict of interest. Counsel contends that application of the conflict of interest test is an imposition of an additional condition not required by the Act. Counsel argues further that the Board's jurisdiction is simply to follow the clear wording of the statute and refuse to certify the applicant to represent the persons in question because they are employed as guards "... to protect the property of an employer ...". The union's counsel, on the other hand, argues that the provisions of section 11 do not apply in all cases where the application for certification relates to persons who are employed to protect the property of an employer. Counsel argues further that the provisions of section 11 are restricted in application to those situations where the persons who protect the property of an employer are, by so doing, placed in a position of actual or potential conflict of interest with employees of the employer of the guards. The inference of counsel's argument is that, even where there is an actual or potential conflict of interest between the guards and employees of a third party employer, the provisions of section 11 should not apply.

14. If there is a proper place for the conflict of interest test in interpreting the language of section 11, as union counsel contends, the Board cannot agree with counsel that the section's provisions should not be applied where the conflict exists only between the guards and employees of a third party employer. The use of the indefinite article "an" before the word "employer" precludes counsel's argument and this is reinforced by the development of the statutory language referred to above.

15. The essence of employer counsel's argument is that the language of section 11

requires no interpretation and it is simply a matter that, where guards are employed to protect the property of an employer, the Board shall not include them in a bargaining unit with other employees who are not guards and if a trade union admits to membership, or is chartered by, or is affiliated, directly or indirectly with an organization that admits to membership persons other than such guards, the Board shall neither certify the union as bargaining agent for a bargaining unit of such guards nor require an employer or employers' organization to bargain with the trade union on behalf of any person employed as a guard. That position begs the question of whether section 11 defines a guard. In the Board's view it does not. The argument of counsel for the employer seems to suggest that the words "... to protect the property of an employer ..." achieves that definition. In the Board's view, all that this phrase achieves is to focus the type of guarding that is being done so that the guarding includes the duty of protecting the property of an employer.

16. Since the section fails to define the word "guard", it falls to the Board to do so. It is precisely for this purpose that the Board has used its conflict of interest test before deciding whether to apply the provisions of section 11. Since the effect of section 11 is to place limits on what constitutes an appropriate bargaining unit and on an employee's free choice of what trade union will represent him in collective bargaining, this test is a reasonable balancing of those restrictions with the need to protect an employer from the conflict posed by a guard's duty to protect that employer's property and any loyalty that the guard might feel towards other employees of the employer.

17. It is clear from the facts in this case that the persons whom the union seeks to represent in collective bargaining are employed as guard's to protect the property of the employer's customers who are also employers. In these circumstances and having regard for all of the foregoing, the Board sees no reason not to apply the conflict of interest test in order to determine whether the provisions of section 11 should prevail in this application.

18. The test is whether duties of the persons who are claimed to be guards for purposes of section 11 raise the real possibility of a conflict of interest with respect to other employees of their employer or, as in this case, a third party employer. Whether this test is satisfied is a call on the facts in each case. In the case at hand, any opportunity for conflict would arise at two contact points: between the messenger-guards and the clients' employees who are designated to be the persons to whom the guards deliver valuables and from whom they receive valuables, and between the truck crews and the vaultmen. In either of these transactions the contact involves simply the transfer of the valuables, which are in sealed containers, accompanied by the signing by the persons involved of appropriate receipts or conveyance documents.

19. The nature of these contacts are quite dissimilar to those found in Board decisions where section 11 has been applied. There is nothing in these contacts which call for the guards to exercise the kind of monitorial authority over other employees which the Board has found to raise the real possibility of a conflict of interest. The Board's decision in *Imperial Leaf Tobacco Limited* [1969] OLRB Feb. 1168, in finding that watchmen were guards within the meaning of section 11, relied, in part, on the fact that the watchmen's authority to stop employees leaving the plant with large parcels to see if they had written authority to do so was "... an element of monitorial authority over the employees ...". Similarly, in its decision in *Corby Distilleries Limited*, [1980] OLRB Rep. Feb. 194, in which the Board followed *Imperial Tobacco*, *supra*, the Board found watchmen to be section 11 guards relying again, in part, on the fact that their duties included activities such as recording all employee vehicles

entering or leaving the plant; denying access to the plant to off-duty employees unless they had written authorization; and recording the entry and departure of employees to and from the plant outside of regular shift change hours. The Board found that these and other duties constituted assignment to the watchmen of a monitoring function over employees of the employer and created a real potential for conflict of interest.

20. The facts in the instant case, in the Board's view, do not reveal a real potential for conflict of interest. Accordingly, the Board finds that the persons affected by this application are not guards within the meaning of section 11 of *The Labour Relations Act*.

21. The Board further finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

22. As the Board noted in paragraph 2 above, the application described the bargaining unit which the applicant was seeking in the following terms:

All employees, save and except supervisors and persons above the rank of supervisor, who work as Vaultmen, Messengers, Drivers and Guards for the employer out of its Toronto area office.

The reply filed by the employer proposed the following description of the unit which it held to be appropriate for collective bargaining purposes:

All security guards in the employ of the Respondent working in and out of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff.

In the course of hearing the representations of the parties on the appropriate bargaining unit, the respondent advised the Board that the collective agreement between it and the predecessor bargaining agent described the bargaining unit as:

"All guard employees being security guards, messenger-driver guards and guards, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week."

While the parties could not agree on how to describe the bargaining unit, they were agreed that all three of the above descriptions dealt with the same employees whom the applicant was seeking to represent. They were also agreed that, there being no part-time employees at work at any of the times material to the application, the bargaining unit should be described so as *not* to exclude part-time employees. Therefore, having regard to those agreements of the parties and for their representations, the Board further finds that all employees of the respondent in Metropolitan Toronto, who work at or out of its Toronto area office as vaultmen, driver-guards and messenger-guards, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

23. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on April 21, 1981, the terminal date

fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER H. J. F. ADE;

Decision of Board Member H. J. F. Ade to follow.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1981

BARGAINING AGENTS CERTIFIED DURING JUNE

No Vote Conducted

1730-80-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, Ontario, (Applicant) v. Saga Canadian Management Services Limited, (Respondent).

Unit: "all employees of the respondent at the University of Ottawa Cafeteria, 85 Hastey Avenue, Ottawa, Ontario, save and except persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (70 employees in unit).

1749-80-R: United Food and Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Applicant) v. Footwear Fashions Limited, (Respondent) v. Footwear Fashions Employees Association, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its plant in London save and except foremen and supervisors, persons above the rank of foreman and supervisor, office and sales staff." (52 employees in unit). (*Having regard to the agreement of the parties*).

2002-80-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Weldco Inc., (Respondent).

Unit: "all employees of the respondent working at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (9 employees in unit).

2573-80-R: United Steelworkers of America, (Applicant) v. Euroclean Canada Inc., (Respondent).

Unit: "all employees of the respondent in Kitchener and Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (67 employees in unit).

2604-80-R: Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C., (Applicant) v. Westgate Nursing Home Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Belleville, Ontario, save and except graduate and registered nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (35 employees in unit). (*Having regard to the agreement of the parties*).

2699-80-R: Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C., (Applicant) v. Westgate Nursing Home Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Belleville, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except graduate and registered nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, and office staff." (13 employees in unit).

0029-81-R: Canadian Brotherhood of Railway, Transport and General Workers, (Applicant) v. Canadian Mini-Warehouse Properties Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except the area manager, persons above the rank of area manager, office and sales staff." (13 employees in unit).

Unit #2: (*See Certification Dismissed — Subsequent to Post Hearing Vote*).

Unit #3: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth save and except the area manager, the persons above the rank of area manager, office and sales staff." (2 employees in unit).

0031-81-R: Hotel and Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant Employees and Bartenders International Union, (Applicant) v. Winco Restaurants Limited, (Respondent).

Unit #1: "all employees of the respondent employed in its food outlets in Windsor, Ontario, save and except head chefs, persons above the rank of head chef and persons regularly employed for not more than 24 hours per week." (33 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent employed in its food outlets in Windsor, Ontario, regularly employed for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor." (69 employees in unit). (*Having regard to the agreement of the parties*).

0137-81-R: Ontario Public Service Employees Union, (Applicant) v. The Children's Aid Society of the Counties of Lennox and Addington, (Respondent).

Unit: "all employees of the respondent in the counties of Lennox and Addington, save and except Executive Director, Supervisor, persons above the rank of supervisor and secretary to the Executive Director. (15 employees in unit). (*In view of the agreement of the parties*). (*Clarity Note*).

0171-81-R: Ontario Public Service Employees Union, (Applicant) v. Baycrest Centre for Geriatric Care, (Respondent) v. Group of Employees, (Objectors).

Unit: "all paramedical employees of the respondent in the Municipality of Metropolitan Toronto, save and except department heads, supervisors and assistant supervisors, persons above the rank of department head, physicians, students and interns and persons covered by subsisting collective agreements and certificates." (20 employees in unit). (*Upon the agreement of the parties*). (*Clarity Note*).

0194-81-R: Service Employees Union, Local 204, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Barnesdale Residence, St. Catharines Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent at its Barnesdale Residence in St. Catharines, Ontario, who are employed for not more than twenty-four (24) hours per week, save and except professional medical staff, office staff, supervisors, persons above the rank of supervisor, and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0248-81-R: Commercial Workers Union, Local 486, (Applicant) v. Greenbank I.G.A., M. Loeb Ltd., Corporate Stores, (Respondent).

Unit: "all employees of the respondent in Nepean, save and except store manager, assistant store manager and persons above the rank of assistant store manager." (48 employees in unit). (*Having regard to the agreement of the parties*).

0255-81-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC:, (Applicant) v. A. W. Jessel's (1970) Ltd., (Respondent).

Unit: “all employees of the respondent at Kapuskasing, save and except foremen, persons above the rank of foreman, salespersons, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (11 employees in unit). (*Having regard to the agreement of the parties*).

0274-81-R: Office and Professional Employees International Union, (Applicant) v. Kapuskasing Credit Union Limited, (Respondent).

Unit: “all office, clerical and technical employees of the respondent in Kapuskasing, Ontario, save and except Treasurer-Manager, Loans Manager and Head Teller and students employed during the school vacation year.” (12 employees in unit).

0296-81-R: Energy and Chemical Workers Union, (Applicant) v. Appleby-Smith Ltd., (Respondent).

Unit: “all employees of the respondent at Oakville save and except foremen, persons above the rank of foreman, office and clerical staff.” (10 employees in unit). (*Having regard to the agreement of the parties*).

0305-81-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Lada Cars of Canada Inc., (Respondent).

Unit: “all employees of the respondent at Ajax, Ontario, save and except foremen, persons above the rank of foreman, office, technical and sales staff, and field service representatives.” (6 employees in unit). (*Having regard to the agreement of the parties*).

0306-81-R: Ontario Nurses’ Association, (Applicant) v. Bobier Convalescent Home, (Respondent).

Unit #1: “all registered and graduate nurses engaged in a nursing capacity by the respondent in Dutton, Ontario, save and except the Director and Nursing, persons above the rank of Director of Nursing and nurses regularly employed for not more than 24 hours per week.” (2 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all registered and graduate nurses engaged in a nursing capacity by the respondent in Dutton, Ontario, regularly employed for not more than 24 hours per week, save and except Director of Nursing and persons above the rank of Director of Nursing.” (5 employees in unit). (*Having regard to the agreement of the parties*).

0312-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Copper Cliff Dairy Limited, (Respondent).

Unit: “all employees of the respondent at Sudbury, Ontario, save and except managers, persons above the rank of manager and office staff.” (19 employees in unit). (*Having regard to the agreement of the parties*).

0321-81-R: United Steelworkers of America, (Applicant) v. Arc Tube Inc., (Respondent).

Unit #1: “all employees of the respondent in Sault Ste. Marie, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period.” (19 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in Sault Ste. Marie, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff.” (2 employees in unit). (*Having regard to the agreement of the parties*).

0326-81-R: Service Employees Union, Local 204 A.F.L.-C.I.O.-C.L.C., (Applicant) v. The Greater Niagara General Hospital Service Unit Part Time, (Respondent).

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week, and students employed during the school vacation period, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical personnel, office and clerical personnel, supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (84 employees in unit). (*Having regard to the agreement of the parties*).

0339-81-R: United Steelworkers of America, (Applicant) v. Pettibone (Canada) Limited, (Respondent).

Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, travelling servicemen, office, technical and sales staff." (42 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than twenty-four hours per week by the respondent at Stirling, save and except the Director of Nurses and persons above the rank of Director of Nurses." (8 employees in unit). (*Having regard to the agreement of the parties*).

0345-81-R: International Molders & Allied Workers Union, (Applicant) v. Hifield Corporation of Canada Limited, (Respondent).

Unit: "all employees of the respondent at London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (36 employees in unit). (*Having regard to the agreement of the parties*).

0347-81-R: The Employees' Association of Muskoka Ambulance Service, (Applicant) v. Muskoka Ambulance Service 299340 Ontario Limited, (Respondent).

Unit: "all employees of the respondent in the City of Bracebridge, and the City of Gravenhurst, save and except supervisors, all persons above the rank of supervisors, and office and clerical personnel." (24 employees in unit). (*Having regard to the agreement of the parties*).

0535-81-R: The Sheet Metal Workers International Association Local Union 562, (Applicant) v. Ziegler Sheetmetal Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all sheet metal workers and sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all sheet metal workers and sheet metal apprentices in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, and all sheet metal workers and sheet metal apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0354-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Selton Engineering Construction Inc., (Respondent).

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same and all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit). (*Having regard to the foregoing*).

0358-81-R: Hotel and Restaurant Employees Union, Local 756, (Applicant) v. United Steelworkers Centre, (Respondent).

Unit: "all employees of the respondent at Hamilton, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and

except building manager, office staff and persons covered by a subsisting collective agreement.” (6 employees in unit). (*Having regard to the agreement of the parties*).

0368-81-R: Labourers’ International Union of North America, Local 183, (Applicant) v. G. J. Raney Limited, (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in unit).

0377-81-R: Toronto Motion Picture Projectionists Union, Local No. 173 of The International Alliance Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Applicant) v. William Sorokolit and Peter Sorok, carrying on business under the firm name and style as Central Parkway Cinemas, (Respondent) v. Employee, (Objector).

Unit: “all projectionists employed by the respondent at the Central Parkway Cinemas in the City of Mississauga, save and except the Manager, and persons above the rank of Manager.” (2 employees in unit). (*Having regard to the above determination, and to the agreement of the parties*).

0410-81-R: United Brotherhood of Carpenters and Joiners of America Local Union 1669, (Applicant) v. Lavern Construction Company Limited, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Townships of Homuth, Tolmie, Agassiz, Adanac, Menapia, Ireland, Webster, Beniah and Mavern in the district of Cochrane, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

0411-81-R: United Steelworkers of America, (Applicant) v. Secord Manufacturing Limited, (Respondent).

Unit: “all employees of the respondent in Stoney Creek, save and except foremen, persons above the rank of foreman, office and sales staff and persons covered by subsisting collective agreements. (6 employees in unit). (*Having regard to the agreement of the parties*).

0412-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Frito-Lay Canada, Limited, (Respondent).

Unit: “all employees of the respondent in London, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0413-81-R: United Garment Workers of America, (Applicant) v. Guelph Elastic Hosiery Company Limited, (Respondent).

Unit: “all employees of the respondent at Guelph, Ontario, save and except foremen and foreladies, persons, above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (103 employees in unit).

0419-81-R: Canadian Union of Public Employees, (Applicant) v. Kitchener-Waterloo Catholic High School Board of Governors, (Respondent).

Unit: “all office and clerical employees of the Kitchener-Waterloo Catholic High School Board of Governors in the City of Kitchener regularly employed for not more than 24 hours per week save and

except students employed during the school vacation period.” (11 employees in unit). (*Having regard to the agreement of the parties*).

0420-81-R: The Canadian Union of Public Employees, (Applicant) v. The Board of Education for the Borough of York, (Respondent).

Unit #1: “all community liaison officers in the employ of The Board of Education for The Borough of York, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, students on co-operative training programs and persons covered by subsisting collective agreements constitute a unit of employees appropriate for collective bargaining.” (3 employees in unit). (*Having regard to the particular circumstances of this case and to the agreement of the parties*).

Unit #2: “all community liaison officers regularly employed by The Board of Education for The Borough of York for not more than twenty-four (24) hours per week and students employed as community liaison officers during the school vacation period, save and except supervisors, persons above the rank of supervisor, students on co-operative training programs and persons covered by subsisting collective agreements.” (2 employees in unit). (*Having further regard to the particular circumstances of this case and to the agreement of the parties*).

0421-81-R: United Food and Commercial Workers International Union, Local 633, (Applicant) v. Steinberg Inc. (Miracle Food Mart Division), (Respondent).

Unit: “all employees of the respondent at 71 Rexdale Boulevard, Rexdale, Ontario, save and except Administrative Managers, Management Staff Assistants, Office, Medical, Security and Laboratory Staff.” (9 employees in unit). (*Having regard to the agreement of the parties*).

0422-81-R: United Food and Commercial Workers International Union, Local 175, (Applicant) v. Thorold IGA Market, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in The Municipality of Thorold, Ontario, save and except manager, persons above the rank of manager, meat department employees, persons regularly employed for the more than 24 hours per week, and students employed during the school vacation period.” (14 employees in unit). (*Having regard to the agreement of the parties*).

0425-81-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local #210, (Applicant) v. Eskerod Signs Limited, (Respondent) v. Employees, (Objectors).

Unit: “all employees of the respondent at Westbrook, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and technical, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (7 employees in unit).

0436-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446, (Applicant) v. Dansar Drywall Limited, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

0453-81-R: Retail, Wholesale and Department Store Union, A.F. of L., C.I.O., C.L.C., (Applicant) v. 342399 Ontario Limited, c.o.b. as Algoden Hotel, (Respondent).

Unit: “all employees of the respondent at its Algoden Hotel in Elliot Lake, save and except managers, persons above the rank of manager, office staff and students employed during the school vacation period.” (22 employees in unit). (*Having regard to the agreement of the parties*).

0462-81-R: Ontario Nurses' Association, (Applicant) v. Oaklands Regional Centre, (Respondent).

Unit: "all registered and graduate nurses regularly employed for not more than 24 hours per week and pool staff, save and except head nurse and persons above the rank of head nurse." (7 employees in unit). (*Having regard to the agreement of the parties*).

0472-81-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, (Applicant) v. Mecon Construction a division of Raymerson Investments Limited, (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all ironworkers and ironworkers' apprentices in the employ of the respondent in all other sectors in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0485-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Will-Thorn Contractors Limited, (Respondent).

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0488-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Zettel Manufacturing Limited, (Respondent) v. Employees, (Objector).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (66 employees in unit). (*Having regard to the agreement of the parties*).

0505-81-R: Ontario Nurses' Association, (Applicant) v. Kirkland and District Hospital, (Respondent).

Unit: "all registered and graduate nurses engaged in a nursing capacity by the respondent at Kirkland Lake, Ontario, regularly employed for not more than 24 hours per week, save and except head nurses and persons above the rank of head nurse." (7 employees in unit). (*Having regard to the agreement of the parties*).

0506-81-R: United Steelworkers of America, (Applicant) v. K-Vet Limited, (Respondent).

Unit: "all employees of the respondent at Cambridge, Ontario, regularly employed for not more than 24 hours per week, save and except foremen, persons above the rank of foreman, quality control personnel, veterinarians, nutritionists, office and sales personnel." (14 employees in unit). (*Having regard to the agreement of the parties*).

0514-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Area Construction Inc., (Respondent).

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the County of Lambton, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foreman, and persons above the rank of non-working foreman." (2 employees in unit).

0547-81-R: International Union of Operating Engineers, Local, 793, (Applicant) v. Towland (London) 1979 Limited, (Respondent).

Unit: "all employees of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

0550-81-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Medishielf Products Limited, (Respondent).

Unit: "all employees of the respondent at Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, service representatives, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

0558-81-R: Labourers' International Union of North America, Local 1036, (Applicant) v. Pitts Atlantic Construction Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (29 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2841-80-R: Retail, Wholesale and Department Store Union, AFL:DIO:CLC, (Applicant) v. Hiawathaland Hotels Limited (operating) The Windsor Park Hotel, (Respondent) v. Hotel and Restaurant Employees and Bartenders International Union and its Local 412, (Intervener).

Unit: "all employees of the respondent at Saut Ste. Marie, save and except office staff and heads of departments." (112 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	94
Number of persons who cast ballots	68

Second Vote

Number of names of persons on revised voters' list	94
Number of persons who cast ballots	68
Number of ballots marked in favour of applicant	31
Number of ballots marked in favour of intervener	37

0117-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Electrohome Limited, (Respondent) v. International Brotherhood of Electrical Workers Local 2345, (Intervener).

Unit: "all employees of the respondent at its Cambridge, Galt plant save and except supervisors, chief engineers, persons above the rank of supervisors and chief engineers, security guards, sales and office staff, persons regularly employed for not more than fifteen (15) hours per week, stationary engineers and persons primarily engaged as their helpers in the boiler room, and all persons employed in the following

classifications: Components Technician, Cost Reduction Technician, Draftsman, Driver Clerk, Final Assembly Project Technician, Industrial Engineers, Jr. Components Technician, Jr. Designer, Lab Technician, Mail Clerk, Maintenance Elevator, Mechanical Draftsman, Mechanical Technician, Methods and Plant Layout Engineer, Model Maker, Model Shop Specialist Model Shop Technician, Packaging Technician, Plant Engineering Technologist, Product Reliability Technician, Production Control Clerk, Production Control Scheduler, Production Engineering Draftsman, Production Eng. Technician, Production Scheduler, Production Schedule Planner, Quality Audit Technician, Quality Control Coordinator, Quality Control Inc. Insp. Tech., Quality Control Technician, Receiving Clerk, Sample Set Assembler, Sr. Lab Technician, Standards Breakdown Technician, Standards Technician and Tool Designer." (400 employees in unit). (*Having regard to the agreement of the parties*).

Number of name of persons on revised voters' list	392
Number of persons who cast ballots	322
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	258
Number of ballots marked in favour of intervener	62

0126-81-R: International Woodworkers of America, (Applicant) v. Marks Lumber Limited, (Respondent).

Unit: "all employees of Marks Lumber Limited in the Township of Brantford, Ontario save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (50 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	44
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	13

0184-81-R: International Brotherhood of Electrical Workers, Local Union 2345, (Applicant) v. Johnston Soper Division of Designed Power Limited, (Respondent).

Unit: "all employees of the respondent in the City of Waterloo, Ontario, save and except foremen, persons above the rank of foreman, office and technical staff, students employed during the school vacation period, students involved in cooperative training programs with high school, community college, university or similar institutions, and persons regularly employed for not more than twenty-four hours per week." (77 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	68
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	29
Ballots segregated and not counted	3

0385-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. M. Loeb Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in Ottawa, save and except those employees working at the respondent's head office, those employees working for Top Valu Gasmarts, those employees in the personnel department, buyers, outside sales staff, dispatchers, confidential secretaries, supervisors, persons above the rank of supervisor, those employees regularly employed for not more than 24 hours per week and students employed during the school vacation period." (117 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		112
Number of persons who cast ballots		104
Number of ballots marked in favour of applicant	57	
Number of ballots marked against applicant	47	

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2349-80-R: Astro Employees Union, (Applicant) v. Astro Dyeing and Finishing Ltd., (Respondent).

Unit: "all employees of the respondent at Hawkesbury, Ontario, save and except office staff, foremen and persons above the rank of foreman. (2 employees in unit).

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots		9
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	0	

0088-81-R: Clarence Robbins, (Applicant) v. Teamsters Union Local 938, (Respondent).

Unit: "all employees of the employer in Sault Ste. Marie save and except foremen, those above the rank of foreman, office staff, sales staff, security guards and office janitors, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (12 employees in unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots		9
Number of ballots marked in favour of respondent	4	
Number aof ballots marked against respondent	5	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0850-80-R: Labourers' International Union of North America — Local 183, (Applicant) v. Matterhorn Construction (Hamilton) Limited, Highrise Crane and Rental Limited, (Respondent).

1984-80-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494; 1007; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Rockwell International Corporation Graphic Systems Division, (Respondent) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and its Locals 61, 1941, 1297, 1067 and 127, (Intervener #1) v. Progressive Lodge No. 126, International Association of Machinists and Aerospace Workers, (Intervener #2).

0030-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Zolty Holdings Limited, (Respondent).

0167-81-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIL-CLC, (Applicant) v. Custom Leather Products Limited, (Respondent).

0486-81-R: London and District Service Workers' Union, Local 220, S.E.I.U.-A.F.L.-C.L.C.-C.L.C., (Applicant) v. Corporation of the County of Elgin, (Respondent) v. Terrace Lodge Employees' Association, (Intervener).

0487-81-R: London and District Service Workers' Union, Local 220, S.E.I.U.-A.F.L.-C.I.O.-C.L.C., (Applicant) v. Corporation of the County of Elgin, (Respondent) v. Terrace Lodge Employees' Association, (Intervener).

0489-81-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Chateau Gardens (Hanover) Inc., (Respondent).

Applications Dismissed Subsequent to a Pre-Hearing Vote

0032-81-R: The Canadian Union of Public Employees, (Applicant) v. The Prescott-Russell Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent in the United Counties of Prescott and Russell save and except the Executive Director, Secretaries to the Executive Director, Managers of Residential Services, Managers of Vocational Services, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (47 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	42
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	23
Ballots segregated and not counted	1

0057-81-R: The Hotel, Restaurant and Cafeteria Employees Union, Local 75 Toronto, Ontario of the Hotel and Restaurant Employees and Bartenders International Union AFL-CLC-CIO, (Applicant) v. Bristol Place Hotel, (Respondent).

Unit: "all employees of the Respondent at the Bristol Place Hotel, Rexdale, Ontario save and except Department Heads and supervisors and persons above the rank of Department Head and supervisors, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (320 employees in unit). (*Having regard to the agreement of the parties*).

0092-81-R: Oil & Gas Technicians, Service, Domestic and General Workers' Union, Local 1267, (Applicant) v. The Trustees of the Toronto General Burying Grounds, (Respondent) v. Service Employees Union, Local 204, (Intervener).

Unit: "all diggers, truck drivers, labourers and general cemetery help employed at Prospect, Mount Pleasant, Necropolis, Pine Hills, Beechwood and York Cemeteries in the Municipality of Metropolitan Toronto and Elgin Mills Cemetery in the Town of Richmond Hill in the Regional Municipality of York, save and except crematorium operators, gardeners, greenhousemen, patrolmen, salesmen, non-working foremen, persons above the rank of non-working foremen, assistant manager, manager and office staff." (42 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	39
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	16
Number of ballots marked in favour of intervener	22

0172-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. John David Eveniss, carrying on business as Min-A-Mart Limited, (Respondent).

Unit: "all employees of the respondent at its retail stores in Metropolitan Toronto, save and except store managers." (20 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	9

0270-81-R: International Woodworkers of America, (Applicant) v. L'Amable Lumber Limited, (Respondent).

Unit: "all employees of L'Amable Lumber Limited, L'Amable, Ontario save and except foremen, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (34 employees in unit). (*Having regard to the agreement of the parties*).

Applications Dismissed Subsequent to a Post-Hearing Vote

1699-80-R: Labourers' International Union of North America, Oil and Gas Technicians, Service, Domestic and General Workers Local 1267, (Applicant) v. WMI Waste Management of Canada Inc., (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener #1) v. Teamsters Local Union No. 419, Warehousemen and Miscellaneous Drivers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener #2).

Unit: "all employees of the respondent working at Maple, Ontario, save and except foremen, persons above the rank of foreman, and office staff." (employees in unit).

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener #1	18
Number of ballots marked in favour of intervener #2	0

2043-80-R: Canadian Union of Industrial Employees, (Applicant) v. Anderson Metal Industries Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not than 24 hours per week and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list at stat of vote	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	19
Number of segregated ballots cast by persons whose name appear on voters' list	1
Number of ballots marked in favour of applicant	10
Number of ballots against applicant	9
Ballots segregated and not counted	1

2761-80-R: United Food & Commercial Workers International Union, Region 18, (Applicant) v. Produce Processors Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of Murray (as set out in all the schedules filed by the respondent and amended during the hearing), save and except supervisors, persons above the rank of supervisors, sales staff, security guards and seasonal employees." (63 employees in unit).

Number of names of persons on list as originally prepared by employer		64
Number of persons who cast ballots	53	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	21	
Number of segregated ballots cast by persons whose name appear on voters' list	32	

0029-81-R: Canadian Brotherhood of Railway, Transport and General Workers, (Applicant) v. Canadian Mini-Warehouse Properties Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*)

Unit #2: "all employees of the respondent in the Regional Municipality of Peel save and except those persons whose place of employment is the head office of the respondent, the area manager, persons above the rank of area manager, office and sales staff." (8 employees in unit).

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	5	

Unit #3: (*See Bargaining Agents Certified — No Vote Conducted*)

0111-81-R: United Steelworkers of America, (Applicant) v. Traid-Triumph Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (36 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		35
Number of persons who cast ballots	37	
Number of ballots marked against applicant	30	
Ballots segregated and not counted	2	

0213-81-R: Ontario Public Service Employees Union, (Applicant) v. Orillia Soldiers' Memorial Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent in Orillia, Ontario, save and except the Secretary to the Executive Director, Secretary to the Associate Executive Director, Secretary to the Director of Nursing Services, Personnel Officer, Paymaster, Departmental Directors and persons above such rank persons regularly employed for not more than twenty-four hours per week, students employed for not more than twenty-four hours per week, students employed during school vacation periods, paramedical employees and employees covered by subsisting collective agreements." (41 employees in unit) (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		43
Number of persons who cast ballots	42	
Number of ballots marked in favour of applicant	21	
Number of ballots marked against applicant	21	

0243-81-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Woodingford Lodge, (Respondent).

Unit: "all employees of the respondent at Woodstock who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		28
Number of persons who cast ballots		28
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	19	

0246-81-R: United Steelworkers of America, (Applicant) v. Glitsch Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Uxbridge, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and technical personnel, sales staff, security guards and students employed during the school vacation period." (80 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		84
Number of persons who cast ballots		78
Number of ballots marked in favour of applicant	38	
Number of ballots marked against applicant	40	

0247-81-R: International Woodworkers of America, (Applicant) v. Britannia Woodmoulding Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (33 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots		23
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	12	
Ballots segregated and not counted	1	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1893-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. D. Shafran Investments Ltd. and/or Highmark Management Ltd. and/or Highmark Properties Investments and/or Highmark Properties Inc and/or 374463 Ontario Limited, 374465 Ontario Limited, 374466 Ontario Limited 428263 Ontario Limited and 401882 Ontario Limited carrying on business as Highmark Properties, (Respondents).

0177-81-R: Sault Ste. Marie Typographical Union Local 746, (Applicant) v. Creative Printing House, (Respondent).

0267-81-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Gottardo Brothers, (Respondent).

0268-81-R: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120, (Applicant) v. Vulcan Machinery and Equipment Limited, (Respondent).

0311-81-R: United Steelworkers of America, (Applicant), v. Steel Warehouse Division of Hugh Russel Inc., (Respondent).

0381-81-R: Ontario Public Service Employees Union, (Applicant) v. Stratford Ambulance Service, (Respondent).

0497-81-R: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120, (Applicant) v. Vulcan Machinery and Equipment Limited, (Respondent).

0438-81-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Gottardo Brothers, (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener).

0439-81-R: The Soo Printing Pressmen and Assistance Union Local 436, (Applicant) v. Creative Printing House, (Respondent).

0440-81-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Applicant) v. Diversey (Canada) Ltd., (Respondent).

0459-81-R: The Labourers' International Union of North America, Local 506, (Applicant) v. Clifford Masonry and Building Restoration Ltd., (Respondent) v. Operative Plasters' and Cement Masons' International Association, Local 172, (Intervener #1) v. Ontario Provincial Conference, (Intervener #2).

0460-81-R: United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Stacey Brothers Limited, (Respondent).

0551-81-R: Canadian Union of Public Employees, (Applicant) v. Family and Children's Services of Lanark County and Town of Smiths Falls, (Respondent).

0563-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Montevideo Court Apartments Ltd. and/or Boa Vista Court Apartments Ltd and/or Donway East Courts Ltd. and/or Boyaca Court Ltd., (Respondents).

0692-81-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Petrolia, (Respondent).

APPLICATIONS UNDER SECTION 1(4)

1578-80-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Primo Titton Construction Limited and J. N. Construction Limited, (Respondents). (*Withdrawn*).

2529-80-R: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. United Shelters Ltd., c.o.b. as Lisgar Construction Co., Known Construction Company Limited and 281981 Ontario Limited, c.o.b. as Sola Developments Co., (Respondent). (*Granted*).

0292-81-R: Local 666, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. E.S. Fox Limited and Dravo Manufacturing Limited, (Respondents). (*Withdrawn*).

0383-81-R: Local 666, or the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. E. S. Fox Limited and Dravo Manufacturing Limited, (Respondents). (*Withdrawn*).

0398-81-R: The Toronto Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. P. D. Bowslough Limited and Esperto Construction Limited, (Respondent). (*Granted*).

0399-81-R: The Toronto Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. P. D. Dowslaugh Limited and Esperto Construction Limited, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2120-80-R: Fausto Mazzei, (Applicant) v. Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, (Respondent) v. Tip Top Tailors, (Intervener).

Unit: "all tailors employed by Tip Top Tailors, at its Central Tailoring Shop in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff." (15 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	10

0218-81-R: William Hall, (Applicant) v. Local 280 of the International Beverage Dispensers and Bartenders Union of the Hotel and Restaurant Employees and Bartenders International Union, A.F. of L., C.I.O., C.L.C., (Respondent).

Unit: "all tapmen, bartenders, beverage waiters, bar boys and improvers and all classifications serving alcoholic beverages employed by the Nag's Head Public House #1, 74 York Street, Toronto, Ontario." (14 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	0
Number of ballots marked against respondent	10

0382-81-R: Phyllis Larmer and Other Employees — C.M.P. Ltd., (Applicant) v. United Cement, Lime and Gypsum Workers International Union, (Respondent). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

0205-81-R: Ontario Public Service Employees Union, (Applicant) v. Thames Valley Ambulance Service, (Respondent). (*Granted*).

0343-81-R: Nepean Public Library, (Applicant) v. Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0427-81-U: Alwell Forming London, a Division of Colony Investments (London) Limited, (Applicant) v. L.I.U.N.A. Local 183, and Tony Dionisio, (Respondents). (*Withdrawn*).

0435-81-U: Madrina Holdings Ltd., (Applicant) v. Toronto Building and Construction Trades Council, International Union of Operating Engineers, Local 793, Sheet Metal Workers Union, Local 30, Drywall Acoustic Lathing and Insulation, Local 675, International Brotherhood of Painters and Allied Trades, Local 1891, Phil Hill, William Morrice, Len Anderson and Sergio Pantarotto, (Respondents). (*Withdrawn*).

0591-81-U: Domglas Inc., (Applicant) v. Those persons named in Shcedue A to D hereto, as amended, (Respondents). (*Granted*).

APPLICATION FOR DECLARATION THAT LOCKOUT UNLAWFUL

0555-81-U: Toronto Motion Picture Projectionists' Union, Local 173, of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Complainant) v. 365414 Ontario Ltd., Hugo Albel and Lasalle Cunningham, (respondents). (*Granted*).

APPLICATIONS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

1525-80-OH: United Electrical, Radio & Machine Workers of America, Local 524, (Complainant) v. Canadian General Electric Company Limited, (Respondent). (*Dismissed*).

APPLICATIONS UNDER SECTION 55

0086-80-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Grand Valley Ready Mixed Concrete Limited, and K-W Blair Ready-Mis (1973) Limited, (Respondents) v. Christian Labour Association of Canada, (Intervener). (*Dismissed*).

0867-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. York Hannover Developments Ltd. (K. Von Wersebe in Trust) — The Lawrence Group and/or York Hannover Developments Ltd. and/or York Hannover Ltd. and/or D. Shafran Investments Ltd. and/or Highmark Management Ltd. and/or Highmark Prooerties Investments, and/or Highmark Properties Inc., (Respondents). (*Withdrawn*).

0179-81-R: United Steelworkers of America, (Applicant) v. Midnorthern Appliances Industries Corporation/Coin Vend Laundry Company; Coinamatic Canada Inc., (Respondent). (*Withdrawn*).

0230-81-R: International Woodworkers of America, Local 2-353, (Applicant) v. G.A.C. Industries Ltd., (Respondent). (*Granted*).

0233-81-R: Graphic Arts International Union, Local 517, (Applicant) v. American Decalcomania of Canada Inc., A Subsidiary of Huron Steel Products (Windsor) Ltd., (Respondent). (*Granted*).

0398-81-R: The Toronto Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. P. D. Bowslaugh Limited and Esperto Construction Limited, (Respondents). (*Withdrawn*).

0399-81-R: The Toronto Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. P. D. Bowslaugh Limited and Esperto Construction Limited, (Respondents). (*Withdrawn*).

JURISDICTIONAL DISPUTES

0042-81-JD: Labourers' International Union of North America, Local 506, (Complainant) v. International Union of Bricklayers and Allied Craftsmen, Local No. 2 and Camsyl Insulation Inc. and Ellis-Don Limited, (Respondents). (*Withdrawn*).

0291-81-JD: Local 666, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Complainant) v. E. S. Fox Limited, (Respondent) v. Sheet Metal Worker's International Associations Local 537, (Intervener). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0634-80-U: Peter Walter Dow, (Complainant) v. International Union of Operating Engineers, Local 793, (Respondent) v. Operating Engineers Employer Bargaining Agency, (Intervener). (*Dismissed*).

0706-80-U: Eli Lalicich, (Complainant) v. Canadian Steel Workers Union, (Respondent) v. Atlas Steels, (Intervener). (*Dismissed*).

1620-80-U: International Brotherhood of Painters and Allied Trades, Local 1684, (Complainant) v. Joseph Zuliani, carrying on business as Zuliani Glass, (Respondent). (*Withdrawn*).

2292-80-U: Suzanne Hebert-Vaillant, (Complainant) v. Canadian Union of Public Employees Local 2327, (Respondent). (*Granted*).

2474-80-U: The International Ladies' Garment Workers' Union, (Complainant) v. Josh Industries Incorporated, (Respondent). (*Dismissed*).

2532-80-U: Amalgamated Clothing and Textile Workers Union, (Complainant) v. Perfect Hosiery Manufacturing Company Division of Centennial Hosiery Manufacturing Company Limited, (Respondent). (*Granted*).

2596-80-U: Ontario Public Service Employees Union, (Complainant) v. Madame Vanier Children's Services, (Respondent). (*Dismissed*).

2687-80-U: Ontario Public Service Employees' Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondent). (*Granted*).

2714-80-U: Canadian Union of Public Employees, (Complainant) v. Prescott & Russell Association for the Mentally Retarded, (Respondent). (*Withdrawn*).

2707-80-U: Service Employees' International Union, Local 183, (Complainant) v. Westgate Lodge Nursing Home, (Respondent). (*Withdrawn*).

2751-80-U: Ontario Association of Weight Counsellors, Hamilton Unit, (The Association), (Complainant) v. Weight Loss, Inc., (Respondent). (*Dismissed*).

2821-80-U: Canadian Paperworkers Union, (Complainant) v. DRG Globe Envelopes, (Respondent). (*Dismissed*).

2774-80-U: Ontario Public Service Employees' Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondent). (*Granted*).

2811-80-U: Ontario Public Service Employees' Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondent). (*Granted*).

0006-81-U: United Food and Commercial Workers International Union, (Complainant) v. Produce Processors Limited, (Respondent). (*Dismissed*).

0066-81-U: International Association of Machinists and Aerospace Workers (AFL-CIO-CLC) Lodge 2183, (Complainant) v. Clark Equipment of Canada Limited, (Respondent). (*Withdrawn*).

0069-81-U: Ottawa Typographical Union Local 102, (Complainant) v. The Glengarry News Limited, (Respondent). (*Withdrawn*).

0070-81-U: Ottawa Typographical Union Local 102, (Complainant) v. The Glengarry News Limited, (Respondent). (*Withdrawn*).

0105-81-U: Canadian Union of Public Employees, (Complainant) v. River Glen Haven Nursing Home (Sutton), (Respondent). (*Withdrawn*).

0114-81-U: Service Employees' International Union, Local 183, (Complainant) v. Westgate Lodge Nursing Home, (Respondent). (*Withdrawn*).

0136-81-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) v. Merrymount Children's Home, (Respondent). (*Granted*).

0156-81-U: Canadian Union of Public Employees, (Complainant) v. River Glen Haven Nursing Home (Sutton), (Respondent). (*Withdrawn*).

0163-81-U: Terry Noble, (Complainant) v. United Steelworkers of America, Local Union 2251, (Respondent) v. The Algoma Steel Corporation, Limited, (Intervener). (*Dismissed*).

0220-81-U: Theodore E. Landry, Steelworker for Algoma Steel Corp., (Complainant) v. United Steelworkers of America Local Union 2251, (Respondent) v. Algoma Steel Corp. Ltd., (Intervener). (*Dismissed*).

0221-81-U: United Food and Commercial Workers International Union, (Complainant) v. Research Foods (1976) Ltd., (Respondent). (*Withdrawn*).

0235-81-U: Ontario Public Service Employees Union, (Complainant) v. The Ontario Metis and Non-Status Indian Association, (Respondent). (*Terminated*).

0253-81-U: The Glengarry News Limited, (Complainant) v. Ottawa Typographical Union Local 102, (Respondent). (*Withdrawn*).

0271-81-U: United Steelworkers of America, (Complainant) v. Dundas Jafine Industries Limited, (Respondent). (*Withdrawn*).

0273-81-U: Manuel Lino, (Complainant) v. International Union of Electrical Workers and Exide Canada Inc., (Respondent). (*Withdrawn*).

- 0301-81-U:** United Steelworkers of America, (Complainant) v. Triad Triumph Limited, (Respondent). (*Withdrawn*).
- 0307-81-U:** Brink's Canada Limited, (Complainant) v. Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America et al, (Respondents). (*Withdrawn*).
- 0313-81-U:** George A. Vazsonyi, (Complainant) v. Terry Edwards, (Respondent). (*Withdrawn*).
- 0328-81-U:** Peter George, (Complainant) v. United Steelworkers of America Local 2859 Babcock & Wilcox Canada Ltd., (Respondents). (*Withdrawn*).
- 0329-81-U:** James H. Geddis, (Complainant) v. George Cruickshank, Lech Jagodzinski, (Respondents) v. Employees' Association of Kodak Canada, (Intervener). (*Withdrawn*).
- 0332-81-U:** United Steelworkers of America, (Complainant) v. Triad Triumph Limited, (Respondent). (*Withdrawn*).
- 0335-81-U:** United Steelworkers of America, (Complainant) v. Linamar Machine Shop Limited, (Respondent). (*Withdrawn*).
- 0336-81-U:** Ottawa Board of Education Employees' Union, (Complainant) v. Ottawa Board of Education, (Respondent). (*Withdrawn*).
- 0344-81-U:** Food and Service Workers of Canada, (Complainant) v. Concorde Maintenance Limited, (Respondent). (*Withdrawn*).
- 0367-81-U:** International Woodworkers of America, (Complainant) v. L'Amable Lumber Limited, (Respondent). (*Withdrawn*).
- 0375-81-U:** William Dunlop, (Complainant) v. United Steelworkers of America Local Union No. 1005, (Respondent) v. Steel Company of Canada Limited, Hilton Works, (Intervener). (*Dismissed*).
- 0376-81-U:** Office and Professional Employees International Union Local 491, (Complainant) v. Canadian Union of Public Employees, (Respondent). (*Withdrawn*).
- 0388-81-U:** Canadian Union of Public Employees, (Complainant) v. Prescott & Russell Association for the Mentally Retarded, (Respondent). (*Withdrawn*).
- 0389-81-U:** Canadian Union of Public Employees, (Complainant) v. Prescott & Russell Association for the Mentally Retarded, (Respondent). (*Withdrawn*).
- 0390-81-U:** C.U.P.E., (Complainant) v. Prescott & Russell Association for the Mentally Retarded, (Respondent). (*Withdrawn*).
- 0396-81-U:** Amalgamated Clothing & Textile Workers Union, (Complainant) v. Candur Plastics Limited, (Respondent). (*Withdrawn*).
- 0403-81-U:** Ontario Public Service Employees Union, (Complainant) v. The Ontario Metis and Non-Status Indian Association, (Respondent). (*Terminated*).
- 0416-81-U:** United Garment Workers of America, (Complainant) v. Guelph Elastic Hosiery Co. Ltd., (Respondent). (*Withdrawn*).

0433-81-U: Candur Plastics Limited, (Complainant) v. Amalgamated Clothing & Textile Workers Union, (Respondent). (*Withdrawn*).

0448-81-U: United Steelworkers of America, (Complainant) v. Pettibone (Canada) Limited, (Respondent). (*Withdrawn*).

0458-81-U: Ontario Nurses' Association, (Complainant) v. Edward Street Manor Nursing Home, (Respondent). (*Withdrawn*).

0469-81-U: Retail, Commercial and Industrial Union, Local 206 chartered by the United Food and Commercial Workers International Union, (Complainant) v. Fabricland Distributors Ltd., (Respondent). (*Withdrawn*).

0477-81-U: Retail, Commercial & Industrial Union, Local 206, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Fabricland Distributors Ltd., (Respondent). (*Withdrawn*).

0478-81-U: Retail, Commercial & Industrial Union, Local 206, chartered by the United Food and Commercial Workers International Union, (Complainant) v. Fabricland Distributors Ltd., (Respondent). (*Withdrawn*).

0492-81-U: Roger Beamish, (Complainant) v. Canadian Union of Public Employees — C.L.C. Ontario Hydro Employees Union, Local 1000, (Respondent). (*Withdrawn*).

0501-81-U: Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Donald Longchamps, General Manager Sheraton-El Mirador Motor Inn, (Respondent). (*Withdrawn*).

0502-81-U: Hotels, Clubs, Restaurants, and Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Ross Sansom, General Manager, Talisman Motor Inn, (Respondent). (*Withdrawn*).

0503-81-U: Hotels, Clubs, Restaurants, and Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Donald Blakslee, General Manager, and the Lord Elgin Hotel, Ottawa, (Respondent). (*Withdrawn*).

0512-81-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Tri-Canada Limited, (Respondent). (*Withdrawn*).

0513-81-U: Beacon Hill Lodges of Canada Limited (Complainant) v. Service Employees' Union, Local 210 A.F.L.-C.I.O.-C.L.C., (Respondent). (*Withdrawn*).

0542-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. McAuley Fuels Limited, (Respondent). (*Withdrawn*).

1-0556-81-U: Toronto Motion Picture Projectionists' Union, Local 173, of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Complainant) v. 365414 Ontario Ltd., Hugo Albel and Lasalle Cunningham, (Respondents). (*Granted*).

0592-81-U: Food and Service Workers of Canada, (Complainant) v. Concorde Maintenance Limited, (Respondent). (*Withdrawn*).

0591-81-U: Domglas Inc., (Applicant) v. Those persons named in Schedule A to D hereto, as amended, (Respondents). (*Granted*).

APPLICATIONS UNDER SECTION 112a

0703-80-M: International Union of Operating Engineers, Local 793, (Applicant) v. Newman Bros. Co. Limited and Newman Bros. Limited, (Respondents). (*Granted*).

0996-80-M: Ontario Allied Construction Trades Council, and International Union of Operating Engineers, Local 793 and its Members, (Applicant) v. The Electrical Power Systems Construction Association and O'Brien Contracting Inc., (Respondents). (*Dismissed*).

1911-80-M: Ontario Allied Construction Trades Council, and International Union of Operating Engineers, Local 793 and its Members, (Applicant) v. The Electrical Power Systems Construction Association and O'Brien Contracting Inc., (Respondents). (*Dismissed*).

1932-80-M: International Brotherhood of Painters and Allied Trades, Local 1684, (Applicant) v. Joseph Zuliani Limited, (Respondent). (*Withdrawn*).

2182-80-M: Labourers International Union of North America — Local 527, (Applicant) v. Paul D'Aoust Construction Ltd., (Respondent). (*Granted*).

2183-80-M: Labourers International Union of North America — Local 527, (Applicant) v. W. S. Burnside Ltd., (Respondent). (*Withdrawn*).

2194-80-M: Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. 449637 Ontario Inc., carrying on business under the name and style of Rivard Mechanical, (Respondent). (*Withdrawn*).

2496-80-M: United Brotherhood of Carpenters and Joiners of America, Local 249, (Applicant) v. Hugh Murray (1974) Limited, and Trend Building, (Respondent). (*Withdrawn*).

2668-80-M: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Hurlenco Limited, (Respondent) v. The Association of Millwrighting Contractors of Ontario, (Intervener). (*Dismissed*).

0600-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Operating Engineers Employer Bargaining Agency and its Affiliate Boston Excavating and Grading Co Ltd., (Respondent). (*Withdrawn*).

0266-81-M: Labourers' International Union of North America Local 1036, (Applicant) v. Gough Masonry Ltd., (Respondent). (*Withdrawn*).

0337-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Capital Paving Limited, (Respondent). (*Granted*).

0338-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. E & E Seegmiller Limited, (Respondent). (*Withdrawn*).

0352-81-M: United Brotherhood of Carpenters and Joiners of America, Local Union 446, (Applicant) v. Gobeil & Malenfant Ltee., (Respondent). (*Granted*).

0373-81-M: Labourers' International Union of North America — Local 247, (Applicant) v. D. A. Foley Limited, (Respondent). (*Granted*).

0387-81-M: United Brotherhood of Carpenters & Joiners of America, Local 18, (Applicant) v. Span Design & Construction Ltd., (Respondent). (*Withdrawn*).

0395-81-M: Sheet Metal Workers' International Association Union, Local 537, (Applicant) v. Hamilton and District Sheet Metal Contractors Inc., Brantford and District Sheet Metal Contractors Inc., Mechanical Contractors Association — Niagara, and Ontario Sheet Metal and Air Handling Group, (Respondents). (*Granted*).

0408-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners' of America, (Applicant) v. Maco Construction Co., (Respondent). (*Granted*).

0409-81-M: Resilient Flor Workers', Local 2965, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Darling Contract Interiors, (Respondent). (*Withdrawn*).

0444-81-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Aiton Power Limited, (Respondent). (*Withdrawn*).

0482-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Madesin Store Fixtures, (Respondent). (*Withdrawn*).

0483-81-M: Pitts Engineering Construction Limited, (Applicant) v. Labourers' International Union of North America, Local 1046, (Respondent). (*Withdrawn*).

0498-81-M: Local 200 of the International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Carmand Joly Painters Ltd. of the Ontario Painting Contractors Association, Acoustical Association Ontario, Interior Systems Constructors Association of Ontario, (Respondent). (*Withdrawn*).

0499-81-M: Labourers' International Union of North America Local 1036, (Applicant) v. Pitts Engineering Construction Ltd., (Respondent). (*Withdrawn*).

0511-81-M: Local Union 1660, United Brotherhood of Carpenters and Joiners of America and William Hugh Warnica, (Applicant) v. The Electrical Power Systems Construction Association, (Respondent). (*Withdrawn*).

0519-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. John Baycroft Mechanical Systems Incorporated, (Respondent). (*Withdrawn*).

0520-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Coolbreeze Service Limited, (Respondent). (*Withdrawn*).

0525-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. E. P. I. Incorporated, (Respondent). (*Withdrawn*).

0527-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Goodwin Refrigeration Limited, (Respondent). (*Withdrawn*).

0528-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Jolean Contracting Limited, (Respondent). (*Withdrawn*).

0530-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Custom Refrigeration Limited, (Respondent). (*Withdrawn*).

0564-81-M: Local 200 of The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. J.P. Matte Peintures Ltd., of the Ontario Painting Constructors Association, Acoustical Association Ontario, Interior Systems Contractors Association of Ontario, (Respondent). (*Withdrawn*).

0577-81-M: The Carpenters' District Council of Toronto, and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Dantam Investments Limited, (Respondent). (*Withdrawn*).

0647-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Colmac Interior Cont. Drywall, (Respondent). (*Withdrawn*).

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0145-81-U: Clarence Kitchen, (Complainant) v. Retail, Wholesale, Bakery & Confectionery Workers Union, Local 461, (Respondent). (*Denied*).



Ontario
Labour Relations
Board

Decisions

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**A Monthly Series of Decisions from the
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Cited [1981] OLRB REP. AUGUST

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NOTICE OF NEW PRACTICE NOTES

PRACTICE NOTE NUMBER 15

August 25th, 1981

JURISDICTIONAL DISPUTE COMPLAINTS

The Board has adopted a pre-hearing conference procedure for jurisdictional disputes heard by the Board under section 91 of *The Labour Relations Act*. By this procedure, the factual and legal issues in the complaint can be identified and agreements reached upon matters not in dispute, thereby reducing the hearing time required for the case and the related expense to the parties. The conference can also be of assistance in facilitating settlement discussions.

The Board will normally convene a pre-hear conference before a Vice-Chairman of the Board within twenty-eight days of the receipt of the complaint. However, where a strike is imminent, and consultation pursuant to subsection 91(8) takes place, the pre-hearing conference will normally be convened at a later date. At that pre-hearing conference, the Board expects the parties to be prepared to discuss the identification and simplification of the issues in the case; the number of days required for hearing and the fixing of a date or dates and a place for hearing; and to agree to facts or other matters not in dispute in order to facilitate the expeditious hearing of the complaint. The Vice-Chairman conducting the conference will not be a member of the panel hearing the complaint on its merits.

The parties are required to file their replies or interventions in accordance with the Board's rules. Particular regard should be had to the requirements of Rule 60 which provides:

A complainant shall file together with his complaint, and every person served with a notice of complaint shall file together with his reply,

- (a) any union constitution;
- (b) any collective agreement;
- (c) any agreement or understanding between trade unions as to their respective jurisdictions on work assignments;
- (d) any agreement or understanding between a trade union and an employer as to work assignment;
- (e) any decision of any tribunal respecting work assignment; and
- (f) any other document;

relating to the work in dispute which may be in his possession and upon which he proposes to rely in support of his claim for relief or his claim that the relief requested should not be granted, as the case may be, and a

statement as to any area or trade practice relating to the work in dispute, and pictures, diagrams or drawings of the disputed work.

Where a hearing continues to be necessary following the pre-hearing conference, the Vice-Chairman convening the conference shall certify to the Registrar all agreements reached by the parties. Each party must file a pre-hearing brief seven days prior to the hearing which contains a concise statement of the issues in dispute, including a detailed description of the work in dispute, and the party's understanding of the material facts upon which it intends to rely. Should a party fail to file the required reply or intervention and pre-hearing brief, or fail to attend the pre-hearing conference, the Board may refuse to permit that party to adduce evidence at the hearing of any material fact not disclosed in the filings or at the pre-hearing conference.

Any party disputing the jurisdiction of the Board to deal with the complaint should notify the Board and the other interested parties at least ten days prior to the scheduled pre-hearing conference. Such notification must include a statement of the material facts upon which that party intends to rely to dispute the jurisdiction of the Board to hear the matter. Upon receipt of such notice, the Board will normally advise the parties that it will use the date and time scheduled for the pre-hearing conference as a hearing before a panel of the Board to deal with the issue of the Board's jurisdiction to entertain the complaint.

It is expected that this procedure will help to simplify jurisdictional dispute complaint hearings before the Board, and will facilitate the expeditious resolution of these complaints by the Board.

PRACTICE NOTE NUMBER 16

August 25th, 1981

EXPEDITED SCHEDULING OF APPLICATIONS UNDER SECTIONS 92, 93, or 135

An applicant seeking an expedited hearing before the Board in relation to an application under section 92, 93 or 135 of *The Labour Relations Act*, must notify the Registrar prior to the filing of such an application. An expedited hearing will be scheduled as quickly as possible; generally within one day of the filing of the application with the Board. However, the date and time for hearing may depend upon the number of parties to the proceeding; the ability of the Board to adequately notify the parties or their representatives of the application; the date and time the application is received by the Board; and the location of the dispute.

In such cases, the applicant must deliver four copies of the application to the Board together with a sufficient number of copies to be served upon the respondents and the other parties named in the application. Also, in order to further expedite the processing of the application by the Board, the applicant should provide gummed address labels setting out the names and addresses of each of the respondents and interested parties. In this way, the Board can process the application and serve notice of it upon the parties immediately. In addition, where feasible, the Board will immediately advise affected parties by telegram or telephone of

the application and expedited hearing arrangements. The Board will generally convene the hearing in the town or city nearest the location of the dispute when the dispute arises more than 80 miles from Toronto. The Registrar, as a courtesy, will also attempt to advise the counsel who normally acts for the respondents of the proceedings if the Registrar is aware of the identity of such counsel.

The Board, through this procedure, seeks to provide a fair and speedy mechanism for dealing with applications alleging unlawful strikes and unlawful lock-outs.

**0933-81-U Union of Bank Employees Local 2104 (Ontario) C.L.C.,
Complainant, v. Airline (Malton) Credit Union Limited, Respondent.**

Change in Working Conditions – Section 79 – Temporary employee's position eliminated while certification application pending – whether for normal business reasons – Whether in contravention of freeze provision

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and B. K. Lee.

APPEARANCES: *Douglas West and Kim Melton for the complainant; R. N. Gilmore and W. D. Robertson for the respondent.*

DECISION OF THE BOARD; August 26, 1981

1. This is a section 79 complaint alleging a contravention of section 70(2) in the termination of the employment of Miss Kim Melton.

2. Miss Melton was hired on a temporary basis on March 2, 1981 as a filing clerk and was laid off in April, returning to work on May 6th. Prior to her hiring there was no filing clerk. It is also noted that a letter dated February 24, 1981 to the then General Manager from the President of the respondent, directing that in view of the impending change in management any hiring of staff would be restricted to "temporary" employment. She testified that shortly after May 6th, Miss Marilyn Innis, Assistant Manager of the respondent had a conversation with her in which Miss Innis stated that "on behalf of her father (who was Manager) she was asking Melton to become full time as she needed, and asked if Melton would be available". Miss Melton replied affirmatively.

3. Mr. W. D. Robertson was employed by the respondent on June 1st and was appointed General Manager on July 2nd, 1981. Robertson interviewed all the staff members including Melton who he saw on July 2nd. Robertson informed Melton that the filing clerk job had been a temporary one and that he intended to eliminate it. He also stated that, in his judgement, what was required in the total staffing was to have one or two more tellers if he could secure authorization for such from the Board of Directors. Robertson asked Melton if she would be interested if he got such authority and she agreed she would.

4. The respondent does business in a main office and also operates, at a different location, a sub-office at which two tellers are employed. A vacancy developed in the sub-office and it was Robertson's judgement that because of the physical separation of offices, he wanted an experienced teller as a replacement. He accordingly hired a new employee on July 30, 1981 who had completed academic training as a teller and who was also experienced in handling money.

5. On July 21st Miss Melton was terminated. At the time of the termination (and continuing as of the date of the hearing) Robertson had not received authority from his Board of Directors to proceed to hire additional tellers. Robertson states that the reason for the elimination of the filing clerk job was based on his own experience of twenty years in banking, which indicated that it was unnecessary to do a major part of the filing. He also testified that the respondent's outside auditors had previously recommended that the job be eliminated and he became aware of this towards the end of June.

6. It is the Union's position that section 70(2) was operative to "freeze" working conditions as a result of an application for certification made on June 9, 1981 and still pending, and that the effect of this freeze was to preclude the respondent from making the change resulting in the elimination of the job. The company contends the change was made for normal business reasons and no other and relies on the *Burlington Carpet* case [1980] OLRB Rep. Oct. 1361, in support of its position.

7. We think it established that as of February 24, 1981 (well in advance of the on set of the freeze on June 9, 1981) the respondent had established its intention to hire staff solely on a temporary basis. Melton was hired on that basis and the conversation she had with the Assistant Manager around May 6th asking if she could work "full time" is, at least equivocal in respect to establishing her "permanent" or "temporary" status. We don't think anything turns on this in any event. The question for decision is whether the employer was entitled as of July 21st to re-organize his work in such a way as to eliminate the need for a filing clerk. It is well-established that the on set of the section 70 freeze as is said in the *Burlington Carpet* case, *supra*,

"...stabilizes the status quo, part of which is the employer's right to conduct its business as it did before and part of which is the set of rights and privileges which have accrued to employees by established practice. Section 70 of *The Labour Relations Act*, therefore, preserves both employee benefits and entrenched employer rights. It does not grant any new right to be protected from any change in the status quo for the duration of the freeze."

In the instant case, the employer had the right to reorganize his operations in the interests of efficiency and had clearly so indicated in the letter of February 24th. As of the on set of the freeze on June 9th, there was no employee right existing which precluded job eliminations for business reasons and, in the absence of any evidence that the action was not for normal business reasons, we must conclude it was an action which was not in contravention of section 70(2). The complainant also argued that it would have been possible for the respondent to have filled the vacancy at the sub-office by a transfer from existing tellers, thus opening up a position at the main office for Melton. Whatever might have been the practicality of that approach, it cannot lead us to a conclusion that the respondent in exercising his judgement in favour of a different alternative was acting unlawfully.

8. The complaint is therefore dismissed.

0752-80-R; 0827-80-R; 0878-80-R; 1048-80-R Canadian Labour Congress, Chartered Local Union No. 1689 (Canadian Association of Burlesque Entertainers), Applicant, v. **Algonquin Tavern**, Respondent; Canadian Labour Congress, Chartered Local Union No. 1689 (Canadian Association of Burlesque Entertainers), Applicant, v. **Waverley Hotel Ltd.**, Respondent; Canadian Labour Congress, Chartered Local Union No. 1689 (Canadian Association of Burlesque Entertainers), Applicant, v. **Carousel Inn (Oshawa) Limited**, Respondent; Canadian Labour Congress, Directly Chartered Local No. 1689, Canadian Association of Burlesque Entertainers, Applicant, v. **Colonial Tavern Limited** Respondent.

Employee – Burlesque dancers having transitory relationship with employers – Employers having little control over work – No evidence of discipline – Whether employees or self-employed

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members J. A. Ronson and B. Armstrong.

APPEARANCES: *Mary Cornish, Ralph Ortlieb, Ed Wright and Mary Johnson for the applicant; David L. Wakely, Allen V. Craig and Mike Rebryk for Algonquin Tavern; no one appearing for Waverley Hotel Ltd.; no one appearing for Carousel Inn (Oshawa) Limited; no one appearing for Colonial Tavern Limited.*

DECISION OF THE BOARD; August 6, 1981

1. This is a series of applications for certification involving the Canadian Association of Burlesque Entertainers (“the union”) and the Algonquin Tavern, The colonial Tavern, the Waverley Hotel, and the Carousel Inn. Another panel of the Board is seized with the narrow issue of whether the union has demonstrated sufficient evidence of “organization” so as to be entitled to trade union status within the meaning of section 1(1)(n) of *The Labour Relations Act*. A more difficult question concerns the “employee status” of the individuals whom the union seeks to represent. If they are “employees” or “dependent contractors”, they are entitled to engage in collective bargaining. If, on the other hand, they are “self-employed” or “independent contractors”, they are not.

2. In accordance with its usual practice, the Board appointed a labour relations officer to inquire into the functions of the subject individuals. Only the Waverley and Algonquin chose to take an active part in these proceedings, and only the Algonquin was represented by counsel. The evidence upon which the Board’s decision is based, consists of a transcript of some 300 pages of testimony given before the labour relations officer. No one has contested the accuracy of the completeness of that record.

3. It will be convenient to deal initially with the nature of the industry, and the common features of the evidence respecting the various respondents. The situation of Rachel Berchtold, a “house dancer” at the Colonial, shares many of those features, but is sufficiently different to merit separate consideration.

4. The individuals here alleged to be employees are male or female burlesque entertainers, hired to entertain an audience by dancing and removing their clothing either to total nudity or a "G-string". The respondents, and the alleged employers in these proceedings, are hotels or taverns who hire burlesque entertainers. There are at least 250 such establishments in the Toronto area, and a number of others in other cities and towns across the province. Their principal business is the supply of food, beverages, or accommodation to the public. It is here that they make their profit. Entertainment is an ancillary concern, which is provided solely to attract or hold customers, and is scheduled to correspond with the anticipated customer density (i.e. during lunch, dinner, or evening periods). In any particular establishment, dancers may be only one component of an entertainment package which may also included "disco", rock or country musicians, mud wrestling, or other forms of entertainment.

5. Because the hotel or tavern's concern is customer drawing power, the establishment typically fixes the number, time and length of the dancers' "shows". These are arranged to correspond with the number of customers likely to be present, or are co-ordinated with the other forms of entertainment which may be provided. The number of dancers hired depends upon the size and character of the establishment, its hours, and the number of beverage rooms given over to this form of entertainment. Usually, there will be at least two dancers employed at any one time, so that their shows can be alternated and the continuity of the entertainment maintained.

6. The relationship with any particular dancer is entirely transitory. Usually, a dancer will work at a particular establishment for no more than one week. While there was some suggestion that dancers might subsequently be re-employed some months later, the preponderance of the evidence suggests that this is very unlikely. Mona Pierson had been in the business for two years and had never worked for the Algonquin before. Debra Finkle, who has been a dancer "on and off" for six years, worked for the Carousel for a single week in the summer of 1980, and recalled working there before on only one occasion, two or three years ago. Lori Lane, whose talent agency had supplied the Algonquin with dancers testified that only two or three of the many dancers she had sent were ever called back for a repeat engagement.

7. Each of the dancers who gave evidence was totally dependent on his/her trade for earning a living, but neither Mona Pierson, nor Debra Finkle, nor Marguerite Mowatt, can be considered economically dependent upon the Algonquin, Carousel, or Waverley respectively. In each case, (depending upon the number of weeks in the year which they chose to work), the proportion of their income attributable to the respondents was no more than five per cent.

8. The Transitory nature of the work relationship is related to the number of sources of work "on the circuit", and the desire of each hotel or tavern to please their clientele by providing new faces every week. Many of the hotels have a regular core clientele who, it was suggested, would become bored if the same act was constantly repeated. The character of the dancing being what it is, the audience apparently demands a regular change of performers.

9. The transient nature of the work relationships also influences the quality of the evidence before the Board. For each respondent (except the Colonial), we have the direct evidence of only one witness, who worked at the establishment for only one week and had little regular contact with either the management or the other employees. In the circumstances, incidents which might support an inference of employment status may simply not have occurred.

10. Work opportunities or “bookings” arise on a weekly basis at the various hotels and taverns “on the circuit”. Dancers move from place to place to take advantage of these work opportunities. They are generally paid a set sum per show, with the average in the Toronto area being approximately \$12.00 for each fifteen minute show. Typically, a dancer would perform five fifteen minute shows per day for six days on either an “afternoon” or “evening” shift; however, there was considerable variation in this regard. The rate paid by establishments on the circuit ranges from \$10.00 to \$15.00 per show and so called “feature performers” (i.e. those who have won beauty contests, or appeared in movies or magazines) may get somewhat more. Dancers who are exceptionally good or prepared to give more “risque” performances may also be paid more. Similarly, there may be considerable variation in the required number of shows and the time frame in which they must be presented. At the Waverley, Marguerite Mowatt was paid \$250.00 for doing four shows per day for six days in the 4:00 P.M. to 8:00 P.M. time slot. This, she said, was considerably less than the standard number of shows or rate. Usually, she would make \$300.00 to \$400.00 in any week in which she worked. Mona Pierson was scheduled by the Algonquin to perform five shows per day for six days between 12.00 P.M. and 7:00 P.M. at \$12.00 per show. Debra Finkle started at the Carousel on a Tuesday, yet still made \$500.00 that week because she performed eight shows over a twelve hour period, Tuesday to Saturday, at \$12.50 per show. Rachel Berchtold, the “house dancer” at the Colonial, performed a varying number of shows six days a week in the 12:00 to 6:30 P.M. time slot at between \$14.00 and \$15.00 per show.

11. There are fewer establishments which have male dancers but there is much more variation in the rate which they are paid. The general evidence of the industry practice suggests that the rates may be as high as \$100.00 per show (although the shows are fewer and considerably longer); however, Randy Embro, the only male dancer who gave evidence, testified that at the Colonial, he was paid \$50.00 per show and that this was his usual rate. Embro would usually do two to three shows at any establishment at which he was working. He had appeared a number of times at the Colonial and expected to do so again. The frequency of his reappearance appears to be related to his personal relationship with the proprietors, and the smaller number of male dancers available to do such work.

12. The dancers are paid in cash or by cheques which are immediately cashed on the premises. There are no deductions for Income Tax, Workman’s Compensation, Canada Pension Plan, or Unemployment Insurance. There are no benefits provided, except that for out-of-town engagements it is usual to provide the entertainer with free hotel accommodation. There are no written contracts. The hotels keep no personnel records or employment documents. None of the witnesses had received T-4 forms or income tax statements. The establishment may not even record the name, address or phone number of the dancers, and may frequently only have the stage name. (This may not be the case for out-of-town bookings where, as at the Carousel, the dancers may be required to produce identification and register as would any other hotel guest.) Indeed, the cheques by which they are paid, may be in the entertainer’s stage name, but since they are cashed on the spot, identification is not a problem. Mary Johnson, a representative of the applicant and a former burlesque entertainer, “signed in” at the Algonquin and was paid in the name of Diane Michaels. It is apparent that the identity of the entertainers is of little concern to the hotel so long as they appear on time, do their shows, and please the audience.

13. Many of the dancers get a significant proportion of their work through agents, although again the proportion varies from individual to individual. Debra Finkle testified that

she got ninety per cent of her work through agents and was associated with a number of different ones; however, her engagement at the Carousel was obtained by a direct approach to the management. Finkle indicated that most clubs would accept dancers on this direct approach basis, and if one applied in advance, one could obtain a booking for the following week. Mona Pierson also used a variety of agents, but she indicated that she obtained about forty per cent of her bookings by her own initiative. Her booking at the Algonquin was obtained through Bill Duddy Enterprises. Usually she would call a particular agent and "pick and choose" from among the bookings he/she had available. If Ms. Pierson didn't like the choice, she would call another agent. Each agent would outline the characteristics of the booking, including number of shows, price, conditions and geographic proximity, and Ms. Pierson would choose the one she wanted. If the club where she wanted to work had an agent she would go through the agent. If the club had no agent or would arrange bookings without one, Ms. Pierson would call the club directly, appear in person or get others to recommend her. Some clubs considered desirable were booked well in advance, and it might be necessary to wait before one could appear there. Just as she could call the agents, agents with whom she was, or had been associated, would call her to outline their available bookings.

14. Randy Embro, the male dancer working at the Colonial at the time this application was made, initially got seventy-five per cent of his work on his own and only twenty-five per cent through an agent; but in more recent times, he indicated that the division was about fifty — fifty. Again, the proportion may be influenced by the smaller number of clubs using male dancers, and the ascendancy of an agency known as Indecent Productions (run by one Bill Indecent, himself a male dancer), which has recently become popular with the clubs. Marguerite Mowatt appears to have been associated with only one agent. She obtained her booking at the Waverley through J.R. Productions. Like Pierson, she would usually call her agent and choose from the available bookings, the one most suitable for her. Rachel Berchtold, the house dancer at the Colonial, got her position through her own initiative after an audition and successful performances. She testified that a more experienced dancer has less need of an agent. Most of the witnesses had a low opinion of the value of agents — even though they usually had used a number of them.

15. The role of the agent is that of a broker or middle-man whose function is to match supply and demand. Only one agent, Lori Lane, gave evidence. Her agency handles various kinds of performers, including clowns, MC's and other forms of entertainment besides exotic dancers. The evidence does not disclose whether the other agencies mentioned were of this general nature, or whether they only specialized in exotic dancers; however, insofar as the relationship between the agencies, the hotels, and the dancers is concerned, the general outlines of Lori Lane's evidence were confirmed by all of the other witnesses. The variation among the agencies, as among the dancers, appears to be a matter of degree rather than kind.

16. An agent will generally have a continuing relationship with a number of hotels which, in turn, may change agents from time to time, or use more than one agent. The agents relieve the hotel of the burden of arranging a large number of casual engagements; and they relieve the dancers of the burden of soliciting work on a personal basis at a large number of geographically dispersed establishments. A typical agent may have as many as forty accounts — that is establishments which he/she undertakes to supply with dancers on an "as needed" basis. Likewise, in order to supply the hotel's requirements, the agent will have a list of dancers who are associated with the agency. This arrangement helps explain why the entertainers will often be associated with more than one agent at the same time. In order to maximize access to

work opportunities, it is necessary to maintain a relationship with a number of agents. In order to obtain work at a particular establishment, it may be necessary to obtain the booking through the agent who acts for that hotel.

17. It is difficult to determine categorically whether the agent is “the agent” for the hotel or the dancer. The evidence suggests both, but on balance the agent’s connection with the hotel is much stronger. It is the hotel, not the entertainer which negotiates and pays the agent’s commission.

18. The booking commission charged by the agents appears to vary from ten to twenty per cent of the dancer’s fee. Debra Finkle testified that ten per cent was the current “going rate”. Marguerite Mowatt testified that it was between fifteen and twenty per cent. Both estimates may be unreliable. The dancers do not pay the agents themselves, and thus have no direct way of knowing the details of the agent’s relationship with the various hotels or clubs. Agents are paid by the hotels at the end of each month on the basis of the number of dancers supplied and shows performed in that period.

19. Lori Lane’s evidence indicated a considerable degree of entrepreneurial initiative on her part. She solicits business from the various clubs, advertises in the yellow pages, and tries to maintain the quality of the talent sent of each client. At the same time, she tries to get the best jobs, and prices for the dancers, and attempts to satisfy their preferences with respect to establishment, shifts, or geographic location. She maintains a card index listing this and other personal information. Lori Lane’s business depends upon her ability to obtain bookings, and, in order to do so, she tried to maintain a good relationship with both hotels and dancers.

20. Lori Lane’s evidence respecting her efforts to maintain “quality” is of particular interest for the light it sheds on the degree of talent, artistry, or professional skill required by the individuals she provides, and the degree of which that skill is recognized and rewarded by “the market”. In her submission, the dancer’s age, appearance, and physique were as important as their dancing skills, experience of professional training. An attractive young dancer with little experience may command the same rate as a more experienced one. This is not to say that the dancers are a homogenous group of totally unskilled individuals. Clearly some are more attractive or talented than others, and this gives them some additional leverage in securing bookings. It is simply that individual hotels may not be particularly sensitive to these considerations, so long as someone minimally acceptable to their clientele appears and provides entertainment. It is the result — entertaining the audience — that the hotel is interested in, not who does it, or how it is done. Except in instances where a dancer solicits work directly, the hotels rely upon the agents to ensure that the entertainers will be able to perform satisfactorily. And as in other parts of the entertainment industry, physical appearance is an important asset.

21. Lori Lane’s evidence also suggest that she may have been more active as an intermediary between the dancer and the club than some of the other agents mentioned in the evidence. She testified that she becomes actively involved in attempting to resolve any friction or dispute which might arise between the dancer and the club. (It was a common complaint that the agents were generally unconcerned about these matters and once they had arranged a booking, had little interest in the problems which a dancer might encounter.) But the situation clearly varies from agent to agent. Mona Pierson testified that she would contact her agent to resolve any problem which might arise or if she were sick or needed time off and required a

replacement. Her complaints about a stage in need of repair for example, were resolved through the intervention of an agent. However, Debra Finkle (who was listed with Lori Lane at the time of this application), had a low opinion of the value of agents, and testified that she had had to find her own replacements, that the agents did not mediate disputes, and that they provided little "protection" for the dancers.

22. The mechanics of the booking process were relatively straight forward and were not subject to too much variation. The entertainer would typically call one or more agents to ascertain the range of bookings available for the following week or weeks in which he/she wished to work. The agents would then review the information concerning the available bookings including: location, nature and attractiveness of the establishment, facilities provided, general "set up", number of shows, time slot and price. Marguerite Mowatt was interested in working in the evening, and would choose from the available evening bookings. The dancers were all free to accept or reject any of the bookings offered. Mona Pierson turned down one of five. However, while a dancer can refuse to accept a job on the terms offered (and from a practical point of view, this depends upon their economic circumstances and financial need) there is not much negotiation on the contract price. The price offered by various hotels may vary but the hotels budget a certain amount for dancers to fill prescribed time slots, and were unwilling to deviate much from that price so long as there were persons available and willing to do the work. Debra Finkle was able to negotiate an additional \$0.50 per show at the Carousel, and testified that she sometimes could negotiate a \$50.00 bonus at the end of the week; but in general, the dancers are required to accept or reject the booking at the specified price and there is little room for variation. Requesting the agents to solicit higher prices is simply unrealistic. In practice, it merely means narrowing the work opportunities to those establishments which, for whatever reason, have decided to pay in the upper portion of the price range. The dancers may enhance their income by working at two places at once (in different time slots or shifts); but, while there is no restriction imposed by the clubs in this regard, the physical demands make it untenable as a regular practice. There is some indication in the evidence that a continued refusal to accept bookings or persistent inadequate performance may prejudice a dancer's ability to work, but none of the dancers who gave evidence had ever been blacklisted and even if such practice were established, the fact that agents were unwilling to refer unsatisfactory performers has little bearing on their employment status. Except in exceptional circumstances, there is considerable discretion to accept or refuse a particular booking.

23. Because of the mechanics of the booking system, the hotels do not personally select their complement of entertainers. Their concern is that a reliable person will appear and perform in the specified time slots, and they will not have any direct input into the selection of the individuals who actually appear. Furthermore, once allocated to a particular establishment, an entertainer can readily arrange to have one or more performances performed by a substitute. While this may have to be approved in advance by the hotel, there is usually no problem as long as the replacement is reliable. Likewise, if a dancer is sick, or for any reason is unable to appear at the appointed time, she or the agent simply arranges for another person to fill in. If she wants time off, she advises the agent(s) that she will be unavailable for that period. As Mona Pierson put it (and Margaret Mowatt substantially confirmed) she arranges the bookings to suit herself. In summary then, it is clear that the dancers are entirely free to work when they wish and have considerable latitude (within the confines of the market) as to where.

24. The clubs supply the stage, lighting, and equipment for playing music, and prescribe the number of shows, show length and shift. A dancer accepts an engagement on these terms. The dancer supplies his/her own labour and skill, together with any props or costume which might be required. The choreography, movements, arrangement, choice of music, and manner of performing are solely the creation of the dancer. The dancer supplies the tapes for her particular act or routine. The hotel plays them. There is little ongoing supervision or control, of (or even much interest in), the content of the performance, so long as the entertainer is on time. As Mona Pierson put it, her responsibility at the Algonquin was to "show up on time, do good shows and not bother the bartender."

25. Ms. Pierson was quite firm that she regarded herself as an independent or freelance professional, and would resist any efforts on the part of the club to interfere with her performance. She maintained that she would "flatly refuse" to accept any interference because it was "her show", her choreography, and her responsibility. There is no reason to disbelieve her, or ignore her own description of her position. The Algonquin made no such attempt. Debra Finkle testified that at the Carousel too, her primary responsibility was to appear and do her shows. There was no ongoing supervision, nor was it specified what was expected of her — other than a request that she end her act with total nudity. This request was rejected but that did not lead to her termination. There were no other suggestions concerning the form or content of her act. She supplied her own costumes to blend with her dance routines, for, she said "I'm not a waitress". At the Waverley, Marguerite Mowatt also did her shows without direction and told the Board that she had never had any complaints about the manner in which she did her work. Even Rachel Berchtold, the house dancer at the Colonial, (from April to at least October 1980) has considerable independence in the way in which she performs. The manageress at the Colonial prefers entertainers with a certain image (curly hair and boots apparently) but Ms. Berchtold's compliance with these requirements was only half hearted — yet, she was not terminated. She did indicate however, that once or twice a week, she would be asked to do a particular piece of music, or occasionally avoid a particular piece of music, or a particular song. Apart from that, she had complete control over her act — subject only to the club's overriding authority to terminate any act which it did not like. It appears that the hotel's right to terminate an unsatisfactory act is entirely unfettered — although none of the alleged employees herein had ever been terminated by any of these respondents.

26. The right to discipline or discharge his employees is an important aspect of employer control. In an industrial context, it is quite common for an employer to employ "corrective discipline" as a means of ensuring compliance with his performance standards, or ultimately to discharge employees whose performance is incompatible with a continued employment relationship. Each of the witnesses was asked whether he/she had been "disciplined" or "discharged"; but they had some difficulty with the concept. When the dancers are only on the premises for a week and are entirely free between shows, it is unlikely that these overt manifestations of employer control would arise very often. The hotel is unlikely to respond to anything other than the most flagrant forms of misbehavior, or entirely inadequate performance, and there were no such instances in the evidence in these cases.

27. Mona Pierson testified that she had never been disciplined or fired in her two years as a dancer, and she could not recall ever seeing anyone else being disciplined — although in 1979, she had "quit" rather than work in a hotel where another dancer was engaging in obscene performances. Rachel Berchtold, Marguerite Mowatt and Debra Finkle, had not been fired either — although again, there were instances where they had refused to continue to work in a

particular situation. Debra Finkle left the Spruce Villa because she was unwilling to perform the obscene acts which the management demanded, and she replaced a dancer who was terminated by the Carousel. However, none of the witnesses had ever been overtly disciplined by any of the respondents herein. There was some friction between Finkle and the manageress at the Carousel where Finkle had been told to "tow the line" and, on one occasion, informed that following her show, she should not have been sitting drinking with her friends in what the manageress considered to be improper dress. Of course, the same rule might well apply to a "self-employed" entertainer remaining on the premises for purposes other than her performances.

28. There was also some suggestion in the evidence that it was common practice to "fine" the dancers or "dock their pay" if they missed a show or did not perform a show of the required length. This was the purported practice of the Carousel, and the dancers did expect to be reprimanded if they were late or missed a show; however, this never happened to Pierson, Mowatt, Finkle or Embro, and certainly did not happen with any of these respondents. Even if it had however, it would not be particularly significant. The dancers contract to perform a set number of shows, for a prescribed length of time, at a set fee, and it would not be surprising if a hotel refused to pay for missed performances or performances less than the required length. An independent contractor, no less than an employee, can expect some response if he does not adhere to his part of the bargain.

29. Despite the absence of direct supervision or control, the dancers usually work in accordance with a generally understood set of "house rules", even if these rules are not formally posted. The dancers must maintain their schedules with respect to number, time, and length of their performances, and they are not expected to put unreasonable demands upon the bartenders or other employees who run the light or tape equipment. Liquor must be used in moderation. Dressing rooms should be kept neat and should not be frequented by unauthorized personnel. Dancers are forbidden to touch the audience or conduct themselves in such a way as will generate problems among the customers or with the obscenity laws. The dancers are free to do as they wish between shows, but they must maintain some standard of decorum.

30. The situation at the Waverley and Algonquin is quite similar. There is almost no evidence of direct employer supervision or control. There is seldom even much communication with the management of the establishment. As at the other hotels, the dancers arrive a few minutes before their first show to familiarize themselves with the "set-up" and schedule, and are free to do as they like between shows. The only regular or necessary contact is with the bartender or "D.J." who runs the lights and music. There is little contact with other hotel employees, whose duties, and terms of employment are much different. At the Carousel Inn, there is slightly more evidence of interaction between Debra Finkle and the manageress, but a close reading of the evidence suggests that this may be more indicative of the personalities of the two individuals (and the fact that Finkle was residing on the premises throughout the week in question) than of the character of the legal relationship between them. The only relationship which stood out as somewhat different was that of Rachel Berchtold, one of the two "house dancers" at the Colonial.

31. Ms. Berchtold had been working at the Colonial for a number of months prior to the application for certification and, in this respect, her relationship was much more stable than that of any of other dancers who gave evidence, or the other dancers employed by the

Colonial on the usual short term basis. Ms. Berchtold explained that the transient dancers provide the variety and the house dancer ensures that there will be a core of good acts or "proven crowd pleasers". She obtained the engagement on her own initiative and by demonstrating this ability. There was no difference in salary, number of shows required, or scheduling, and the dancers are relatively free to arrange their own rotation. As usual, payment is on a "per show" basis and there is no premium or overtime pay for work on holidays. There is the same absence of direct control over show content — other than the usual requirement that there must be some variety and the management's preferred image to which we have already referred. On the other hand, Ms. Berchtold did provide her name, address, telephone number and social insurance number, was scheduled as to have every fourth week off, (a schedule not adhered to it seems) and seemed to be assured relatively steady employment. There is still considerable flexibility even on the part of a house dancer. Ms. Berchtold has called in sick (two or three times in the period of April to August 1980) and on each occasion, she arranged for a substitute to appear on her behalf. However, there is no doubt where real economic power resides. During the period that Ms. Berchtold has been with the Colonial, the club has unilaterally reduced, then later raised the price for shows and also altered the number of shows required of each dancer. These alterations were apparently only applied to the house dancers. Ms. Berchtold has also had her pay reduced when she was late so that the entire list of scheduled shows could not be completed. In each case, the decision was made unilaterally and presented to the dancer on a take it or leave it basis.

32. Much of the union's evidence has no direct application to these respondents, and was tendered solely to acquaint the Board with the nature of the tavern industry, and the problems which dancers occasionally encounter. The Board accepted this evidence on the basis that it might clarify the general economic context in which the dancers earn their living, and thus assist the Board in determining their status. We wish to make it clear however, that this evidence cannot be applied automatically to these respondents. We do not think we are entitled to equate them with other taverns where the situation may well be different, and, insofar as these establishments are concerned, there was no evidence of the serious abuses of which the applicant complained.

33. The picture painted by the applicant was not a pleasant one. Counsel submitted there were instances where a dancer had been fired because she refused to perform obscene acts or submit to an owner's working conditions, or complained about the quality of the stage facilities, or adequacy of dressing rooms. The clubs, it was contended, regarded the dancers simply as "bodies", largely interchangeable, and given little consideration or respect. Owners could refuse to employ, or terminate a dancer, simply because they were dissatisfied with a dancer's physical attributes. Yet the dancers had no recourse or no protection.

34. These concerns were sincerely expressed, and the Board has some sympathy for them; but the lack of consideration for the individual dancer is largely related to the fact that she is an entirely transient (and virtually anonymous) presence in a business in which entertainment is not even the principal concern. Much of the shabbiness of the surroundings is related to the calibre of the establishments where the dancers are likely to appear. Marginal members of a highly competitive industry simply do not have first class facilities for the dancers, their permanent employees, or even their clientele. And, given the nature of the performances and bookings, it is not surprising that the dancers occasionally encounter problems. Mona Pierson described her functions as "choreographing certain moves to certain songs"; but Marguerite Mowatt's evidence was more direct and probably more accurate. She

testified that her function was (by insinuation and suggestion and within the limits of the obscenity laws) to "get the audience involved, and tease the living daylights out of them". The dancers market their sexuality, not just their dancing skills, and in the circumstances, some verbal abuse, however distasteful, is probably inevitable, and "comes with the job territory". And paradoxically, the social milieu which condones this attitude to women, also provides the primary market for the dancer's services. A shift to either more traditional social norms, or more progressive attitudes to women, could well threaten the basis for the dancers' livelihood. Finally, it must be noted that despite the problems which they may encounter, the dancers have much more freedom, and their income is higher, than other untrained individuals employed in more traditional occupations in the industry.

II

35. There are numerous situations at common law, or under various statutes, where it is difficult to say whether a particular individual is an "employee" or a self-employed "independent contractor". This case presents just such a situation, and there is no shorthand formula or magic phrase that can be applied to find the answer. What is important is that the total factual context be considered in light of the established principles. The parties were virtually *ad idem* as to the *general* principles to be considered. The real issue was how those principles should be elaborated and applied in the unique circumstances of this case.

36. In seeking the answer, in law, to the question: "is this person an employee or self-employed", the courts have traditionally focused upon the degree of control exercised by the alleged master over the *manner* in which the alleged servant performed his work. At common law, the issue arose most frequently in determining vicarious liability in the law of tort, and in that context, it made sense to affix an employer with liability, only if he had control of the actions of the servant which gave rise to injury. Control may be much less significant when it is used not to establish the employer's liability but to determine whether a contract of service exists in the first place. (See *Denham v. Midland Employers' Mutual Assurance Ltd.*, [1955] 2 Q.B. 437) Nevertheless this test is still much referred to, and was elaborated by MacKenna, J. in *Ready Mixed Concrete (South East) Limited v. Minister of Pensions and National Insurance*, [1968] 2 Q.B. 497, as follows:

"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted... If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."

37. The control test assumes that the employer is both manager and technical expert, and reflects a less developed stage of society in which the employer could be expected to be superior in skill and knowledge. It may still be a useful test in dealing with simple relationships; but it is entirely unrealistic to suggest that, the pilot of an aeroplane, or any number of "professional" employees, are under the direct or immediate control of their employer. An uncritical application of the control test simply ignores the degree to which skilled or professional employees operate autonomously. The presence of direct control is significant, but its absence may be less so.

38. A second, and somewhat more sophisticated approach, (and one which has been used by this Board in a number of cases) is the so-called “fourfold test” referred to by Lord Wright in *Montreal v. Montreal Locomotive Works Limited*, [1947] 1 D.L.R. 161 (P.C.) At page 169, his Lordship comments:

“In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer’s right to interfere with the employee’s conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words, by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.”

This test is helpful in many situations; but it is not without its faults. As the Board noted in *Livingston Transportation Limited*, [1972] OLRB Rep. May 488:

“While the fourfold test is helpful in most situations, and notwithstanding that the Board has indicated that all four tests must be satisfied to determine whether a person is an independent contractor, *Cima Limited* [1963] OLRB Rep May 100 at 102; *Nicks Haulage Limited*, [1970] OLRB Rep. Nov. 871, there are cases where its application lends itself to artificiality. In many cases the evidence weighs heavily in perhaps one or two of the categories but does not weigh heavily in either the third or fourth. In some situations there is strong evidence in one or more categories with no evidence in another category. How then is one to apply the test where the weight of the evidence in two categories suggests one type of relationship, whereas the weight in the other two categories suggests another form of relationship?”

39. A third approach suggested by the latter part of Lord Wright’s decision in *Montreal Locomotive*, and later developed by Denning L.J. in a series of cases, is the so-called “organization” or “integration” test, in which the question becomes: “does the alleged servant form part of the alleged master’s organization”. In *Stephenson, Jordon and Harrison Limited v. MacDonald and Evans*, [1952] 1 T.L.R. 101, Denning, L.J. put it this way:

“Under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.”

In *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248, he remarked (at 295):

“The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization”.

40. A final approach, — much relied upon by the applicant in this case, — is the so-called “statutory purpose test”. This approach involves the (fairly obvious) proposition that in applying the Act, and in selecting and weighing the factors which point towards one interpretation or the other, the Board should take into account the concerns underlying the legislation. As the United States Supreme Court stated in *N.L.R.B. v. Hearst Publications Inc.*, (1944), 322 U.S. 111:

“The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to “employees” within the traditional legal distinctions separating them from “independent contractors”. Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation’s economy. Some are within the Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other depending upon the weight of this balance and its relation to the special purpose at hand.

Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute’s purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are “employees” and their employers. *Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as “helpless in dealing with an employer”, as “dependent . . . on his daily wage” and as “unable to leave the employ and to resist arbitrary and unfair treatment” as the latter. . . And for each, collective bargaining may be appropriate and effective for the “friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions.”* In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.”

41. While it is useful for analytical purposes to set out the general approaches which the Board has employed in the past, it must be remembered that each of these “tests” is merely a guideline. No approach will be controlling in a particular case, nor will the various formulations necessarily give an unequivocal answer. Despite the undoubted authority of the cases in which they were enunciated, the value of these “tests” lies solely in their utility, in assisting the Board to reach a conclusion which is fair to both the statute, and the context under review. Usually the Board’s own jurisprudence is equally useful — and herein lies a problem.

42. Trade unions have been active in the entertainment industry for many years, but we were unable to find any exact parallel with the present case — perhaps because the transitory nature of the work relationships, and the multiplicity of employers has heretofore prevented the development of collective bargaining. In consequence, (and in contrast for example, with the situation of owner/operators in the aggregate industry) the Board does not have the advantage of being able to compare the instant case with a settled body of its own jurisprudence arising out of the same industry. But this does not mean that the problem must be analyzed in a legal vacuum. Some assistance can be found in the common law principles to which we have already referred. In addition, we were able to find a number of cases in other jurisdictions, or under other statutes which explore the legal attributes of “employment” in the entertainment industry. Of course, decisions made in a different statutory or legal context must be used with some caution; but the issue is not so unique, nor is the law so rigidly compartmentalized, that principles used to determine employment status in one situation are entirely inapplicable in another. Between the two contradictory poles of “employee” and “independent contractor”, there is always a hazy spectrum of intermediate cases, and it may illuminate the issue before the Board in this case, if we sketch in briefly how, and where, other courts or tribunals have drawn the line. As will become apparent, these decisions are not entirely consistent with each other, but insofar as the present case is concerned, they all point in the same direction.

III

43. Broadly speaking, the American cases which resemble the instant case tend to support the position of the respondents — either because they take a narrow view of the control test and stress the independent creative talent of the artist, or because they rely on factors which are not present here. Several of these cases are decisions of the National Labour Relations Board (NLRB) arising in a collective bargaining context. The others are court decisions involving social security levies, in which the liability for tax depended upon the employment status of the subject individuals. It might be noted however that, in the case of the U.S. social security decisions, the relevant legislation merely codifies the common law tests along lines similar to *Montreal Locomotive, supra*.

44. In *America Guild of Musical Artists (National Symphony Orchestra)*, (1966), 61 LRRM 1426, the NLRB was called upon to determine the employee status of two “guest” ballet dancers who had contracted to perform in the annual Christmas ballet jointly sponsored by the National Symphony Orchestra and the Washington School of Ballet. One of the dancers was the prima ballerina of the Palm Beach Ballet. The other was a choreographer who agreed to appear as a dancer for a fixed fee over and above her regular salary. Both dancers supplied their own costumes and make-up. No deductions were made in respect of income tax, social security levies or workmen’s compensation insurance. The NLRB, noting that the

alleged employer retained little, if any, control over the manner in which the guest dancers performed their roles, found them to be self-employed rather than casual employees.

45. A similar result was reached in *Century Broadcasting Corporation*, (1972), 81 LRRM 1011, which involved “freelance” announcers hired to do pretaped commercials or announcements interspersed in the company’s programme of recorded music. The company sought to maintain a variety of voices, and to this end, kept a list of announcers who would be invited to participate on a rotating basis. Fees were negotiated on a “per session” basis, and the announcers were entirely free to accept or reject the company’s offer depending upon their outstanding commitments, (or, sometimes, their association with a competitor’s product). In view of the lack of supervision or review of the announcers’ work, the announcers’ complete freedom to accept or reject assignments offered or to select substitute announcers from the employer’s list, the broad latitude in scheduling taping sessions, and the absence of any restriction as to their outside work, the NLRB found that the announcers were self-employed and dismissed the union’s representation application.

46. In *Strand Art Theatre*, (1970), 74 LRRM 1589, the NLRB had before it an unfair labour practice complaint filed by two entertainers who had allegedly been discharged for their trade union activities. The entertainers (billed as “Budddy O’ Day”, a comic, and “Tootsie Roll”, an exotic dancer) had been employed by the theatre for almost two years. Again, the Board found that the entertainers were independent contractors and stressed their individual creativity and the absence of control:

“Mr. Tackett created the acts for himself and his wife. He had many acts and changed them each week. He produced scenes to fit the size and cast of the theatre and requested props, cues, and lights from the Operator for the scenes. The Tacketts supplied their own costumes, makeup, and some props. The acts were part of the entertainment, which included others, in a stage show and motion pictures. The Tacketts performed several times a day, and Mr. Tackett sometimes acted as the master of ceremonies.

Mr. Tackett testified that how the act was to be performed was up to him. There is no evidence that he or his wife ever received directions on how to perform the act from Respondent’s officials. Bertram Ross, who was in charge of the theatre in the absence of his manager father, gave instruction as to the length of a number, but not its content, and as to suitability of costumes. He also determined the number of scenes and whether Mr. Tackett would act as master of ceremonies, but this seldom varied.

Respondent contends that the Tacketts were independent contractors in their relationship with Respondent. We agree. Of all the factors enumerated by the Trial Examiner, the most important is the right to control the manner and means of performing the work. In our opinion, the following factors establish that the Tacketts had the right to control the manner and means of performing their work. Mr. Tackett alone wrote the material for the scenes performed by him, his wife and supporting case. He adapted the scenes to stage size and to the personnel in the stage show. The manner of entertaining the audience was the sole responsibility of the Tacketts. The only direction they ever received

related to length and number of scenes and to the scantiness of a costume as measured by local regulations. Apart from supplying the theatre stage, music and lights, Respondent played no part in the Tackett's performance."

Despite the longevity of the relationship the contention that the entertainers were "employees" of the theatre was rejected.

47. In *Strand Art Theatre*, the Board put considerable reliance upon *Radio City Music Hall Corporation v. the United States*, (1942), 50 F. Supp. 329; (affirmed 135 F. 2d 715) — a decision of the second circuit (New York) Court of Appeals involving social security levies. There, the individuals in question were "special artists" hired to fill in the eight minute "open spots" in the company's stage show which were not covered by its own orchestra, chorus, or house dancers. These "special acts" included performing animals, acrobats, comedy skits, singers, dancers, jugglers, ventriloquists, and the like; and, as in the present case, the relationships were entirely transitory. There were one hundred and seventeen special artists during the taxation year. Each was engaged on a weekly basis, and paid differing amounts in accordance with Radio City's assessment of their worth. Their fees were frequently much greater than the amount paid to the "house entertainers", and, of course, Radio City had no responsibility for their training. There was, however, a considerable degree of co-ordination and control over the conduct of the various acts:

"There can be no question here that the result to be obtained was the amusement of the public. Of that the plaintiff had full control. It furnished the place, the stage, the dressing rooms, the music, the lighting, and all of the instrumental music. Necessarily, to present a connected show, it had and exercised the right to specify who should take part in it, when he, she or they should perform, and how long the act would be, what color scheme should be used, a harmonious costume on the part of all participants, rehearsals to assure a connected and uninterrupted performance and the avoidance of embarrassing mishaps, a use of language or pantomime in no way offensive, the position on the stage and the manner of entrance and exit, not only for the convenience of the actor but also that the act might properly be seen and heard, and the substitution, on occasions, of music to fit in with the scheme of the entire stage show. These undoubtedly were requisites in order to make the whole performance successful and attractive to those who might pay to see and hear it."

The trial judge, focusing on the artist's talent or acquired skills and the absence of control, found that the entertainers were self-employed:

"Contrasted to the foregoing, (house entertainers) the rights of the special performers were not governed by many of the rules applicable to the regular employees. The plaintiff had no control over the method or means of the entertainment possibility of the act; that was the invention and development of the special performer, acquired by many weeks and years of steady application, thought and practice. That was their creation, whereas the acts of the regular employees were the creation and

development of the plaintiff. The plaintiff did not and could not tell a juggler how to juggle, an acrobat how to tumble, a magician how to trick or mystify the eye, the special dancer how to dance or what steps to produce. The voice of the soloist was not that over which the plaintiff had any control. It was a natural acquisition, developed by the individual's study and training, in which the plaintiff never had any part. Even the monologue or dialogue was that of the artist and was not supplemented by the plaintiff, but was subject to deletion if it offended good taste, or was too long to fit into the time allotted to the act. The performance of the artist depended upon its reputation for entertainment, its popularity, its drawing power; that is what he sold to the plaintiff, and which he also offered to all others of the general public who might desire to purchase it. The artists were generally employed through an agent. Their act was contracted for, and if not continued for the period of the contract, was required to be paid for in full in any event. The particular feature was purchased as any other commodity, and was paid by the plaintiff in the same way and by the same kind of cheque that it used in the purchase of merchandise and in the payment of fees of lawyers and certified public accountants. There was no permanent employment, only occasional and sporadic engagement. The artists in many instances were not even required to rehearse, except as it might be necessary for them to know when they were to go on, where, and at what cite. They had the right, infrequently exercised, to contract for engagement at other places of amusement provided there was no interference. In other words, theirs it was to decide how the act should be done; the plaintiff's, where and when. The artist decided and carried out the means and methods by which the act produced its popularity and amusement value. The plaintiff furnished the place and setting appropriate for the whole performance."

This conclusion found favour with Hand, J. writing for a unanimous Court of Appeal — although that court focused more on the absence of control than the unique character of the performers' talent, or the training which they had to undertake to develop it. The selection and coordination of the various acts was considered an ordinary part of the theatre business. It did not imply "employer" or "employee" status:

"If Markert had never seen the "act", he ordinarily required an "audition". To fit the "act" into the program he would sometimes cut it down and have the actor piece together what remained. Sometimes it was necessary for the actor to put something in the place of what was cut out, but Markert never attempted to say what it should be. He did indeed at times depart from this in the case of music, the actor being compelled to rehearse the new pieces for an hour or two; but that was done only to save the performance fee that would have been charged if the actor's music had been used; or when on occasion he put a song of his own choosing into a singer's repertory. At times he would also reduce or amplify the volume of a singer's voice. The plaintiff furnished the stage, scenery, lighting, orchestral music and attendants; sometimes it supplied a costume.

For one of the acts, the producer directed the staging according to his

requirements, fixed the times for the rehearsals, the number of performances in a day, required promptness in attendance, and prescribed the order of the songs and dances. He determined the time at which the "act" should appear on the stage, and sometimes insisted on leaving out parts of the dialogue or other features when he thought them unsuitable for the plaintiff's audience. His effort was to weld the different "acts" together into a harmonious program, but always giving each actor his opportunity to perform without interference. Sometimes he made an "act" part of a playlet, and then the actor might be required to mingle with the chorus and put on a costume congruent with the scene and with those of the other actors.

. . .

In the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together, if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. By far the greater part of Markert's intervention in the "acts" was no more than this. It is true, as we have shown, that to a very limited extent he went further, but these interventions were trivial in amount and in character; certainly not enough to color the whole relation. If the depositions had constituted the whole evidence upon a trial there would have been no issue to submit to a jury."

48. The *Radio City* decision was distinguished in at least two subsequent cases — but not on grounds which assist the applicant in the present case. In *Club Hubba v. U.S.*, 239 F. Supp. 324, the court was again dealing with social security tax levies — this time in respect of certain Japanese entertainers who performed as a group, supplementing the club's "star performers" (usually strippers or other exotic dancers). These entertainers were brought from Japan to perform under six month renewable contracts, and received room and board, insurance coverage, and health care. They were restricted as to their other employment, and their passports were impounded by the club on arrival. In the circumstances, despite the lack of control over the *manner* in which they performed, the court found that they were clearly part of the respondent's organization, and there was sufficient control over their *general* conditions to warrant a finding that they were employees.

49. In *Ringling Brothers — Barnum and Bailey Combined Shows v. Higgins*, (1951), 189 F. 2d 865, the Court of Appeal for the second circuit also had the opportunity to reconsider and distinguish its own earlier decision in *Radio City Music Hall*. *Ringling Brothers* involved the employee status of the company's "feature acts" — including aerial trapeze, balancing, high wire, trained rooster, seal, horse, dog, comic, acrobatic and "human cannonball" acts. Again, consideration was given to the control test, but this time there was more concern with the artists' but this time there was more concern with the artists' relationship with the employer, and their total integration into the employe's organization. Some of the entertainers had been in the organization for more than twenty years. The control and co-ordination which had been treated as merely incidental in *Radio City Music Hall*, were

here considered sufficient to render the performers an integral part of the plaintiff's business — "the circus":

"The sharp issue as to control is carried to us, on appeal, where plaintiff vigorously attacks the findings of the judge. As usual, we have a difference in emphasis. Plaintiff stresses the individuality of each act; defendant and the court below, the power and the practice to weld all together into one distinctive show known and loved by young and old as "the circus". Of course the plaintiff is right in details; it could hardly be expected to direct the manner and means by which a human cannonball should be shot from a gun. That kind of artistry is indeed what it employs its performers for. But it seems to us that in a broader sense the trial judge is right — or so nearly right as not to be reversible on the facts — when he finds an ultimate power of direction and control in the circus management. Thus he rightly says: *"The performers were an integral part of plaintiff's business of offering entertainment to the public. They were molded into one integrated show, "the circus". It was not a loose collection of individual acts like a vaudeville show. The individuality of the performers was subordinated to the primary purpose of enhancing the reputation of the plaintiff and of producing one integrated show that would entertain the public. One example of this was the fact that, if a performer appeared in more than one act on the program, he would be given a different name by the circus each time he appeared". And elsewhere he points out the power to suggest changes, or improvements to shorten an act, to order objectionable parts deleted, to supervise the moral conduct of the performers, to require that a certain moral standard be maintained.*

Plaintiff relies heavily on *Radio City Music Hall Corp. v. United States*, 2 Cir., 135 F 2d 715, where we held that the changing weekly acts at Radio City Music Hall were by independent contractors and the Corporation was not subject to this tax. But we think the differences are striking enough to point the moral. *Contrast, for example, the 117 different acts there occurring in the single taxable year with the more durable relation disclosed by the contracts or the actual history of Adler and Concello here.* It is true that the Radio City director did "fit" his act into the program by cutting it down where necessary, and there was a certain amount of adjustment to get a particular act into an open spot in the program which particularly featured motion pictures. But we are not disposed to reverse the trial judge as to this. *Rather we agree that the performances there remained over the weeks a series of vaudeville and like disparate acts; they did not, as here, become "the circus."*

[emphasis added]

50. A further, very recent NLRB decision — and one which has striking similarities with the case at bar — is *American Guild of Variety Artists (AGVA) v. Ibis Enterprises Inc. and Sibi Ventures Inc.* (Case number Z-RC-18724 decision of regional director released June 30, 1980, unreported). There the parties were an established entertainers' union affiliated with the AFL-CIO, and a business enterprise which operated a restaurant and nightclub in New

York, known as the "Club Ibis". In the Club Ibis was the "El Sultan" room, and in the El Sultan room, middle eastern dancing (more commonly known as "belly dancing") was performed every evening to the accompaniment of appropriate music. The dancers regularly performed two shows a night for two or three nights in succession, and were paid in cash, without deductions, on the night of the performance. Rates varied within a fairly narrow range, with slightly more being paid for experienced dancers. In contrast with the present case, there were regular repeat performances, and the skeletal terms of engagement were reduced to a written agreement specifying the number of shows, time frame and fee. Dancers were also somewhat less regimented than in the instant case, but like the entertainers here, they were able to exchange dates, arrange for substitutes, and when they wished to have time off, simply advised that they were no longer available. Club Ibis, of course, provided the stage and dressing rooms, and the dancers chose their own costumes, cosmetics, props, music, and choreography. As in the instant case, the dancers often determined among themselves the order of their appearances on a given night. The only requirement placed upon them by the Club was that they observe common standards of decency. It was held, following *Radio City, Strand Art Theatre* and *American Guild of Musical Artists Supra*, that the dancers were self employed independent contractors, and the union's representation application was dismissed.

51. The situation of casual entertainers had not been entirely neglected in the English case law. The *Radio Music Hall* case finds it parallel in *Gould v. M.N.I.*, [1951] 1 All E.R. 368, where the court dealt with unemployment insurance levies payable in respect of a musical hall comedian hired to appear for a week. The facts and the court's decision are accurately summarized in the headnote:

"The appellant, a music-hall artist, entered into a written contract with the second respondent to appear in a variety "act" at a theatre for one week. The contract, inter alia, provided that the appellant might be transferred to other theatres of the same management, prohibited his appearance at certain other theatres, specified penalties for non-appearance in accordance with the contract, provided for his acting as deputy at other theatres in as emergency, and contained an undertaking that his performance would not be dangerous. Rules attached to it required him to attend rehearsals at times stipulated by the management, stipulated the times of performance, dealt with illness and provided that, if required, the appellant should submit to medical examination, dealt with the use of improper words and gestures, authorized a fine or cancellation of the agreement if the appellant was in the theatre when intoxicated, empowered prohibition of the whole or part of his performance if it was considered unsuitable or displeasing, prohibited variation from the words of songs or dialogue previously approved, and required the appellant to produce a new or revert to an old "act" on request.

Held: (i) although the second respondent was empowered under the contract to prohibit an objectionable part of the appellant's performance and to require him to produce a new "act" or revive an old one, those and the other provisions of the contract and rules were necessary for the proper working of the theatre, and the performance of the appellant depended on his skill, personality, and artistry with which the contract

gave the second respondent no right to interfere; the contract, therefore, was one for services and not of service; and the appellant was a "self-employed" person within the meaning of the National Insurance Act, 1946, s. 1(2)(b), and not an "employed person" within s. 1(2)(a)."

Ormerod, J. applied the control test and concluded that the degree of control was insufficient to warrant a finding of employee status.

52. A very different view of the control issue was expressed by four judges of the Scottish Court in *Stagecraft Limited v. M.N.I.*, [1951] S.C. 288. There, the court was again concerned with a social insurance levy under the *National Insurance (Industrial Injuries) Act* which required contributions for "employed persons" employed under a "contract of service" or apprenticeship, but excluded "self-employed" persons. The individual in question was a comedian who contracted with a company of theatrical producers to appear in a production known as "resident Variety". In resident Variety, a company of variety artists is brought together for a season. Each member performs some of his own material, as well as scenes and sketches in which he co-operates with other members of the company. Under the contract, the comedian was bound to play to the best of his ability, the part of parts set down for him in all productions, to comply with rules, directions and instructions of the stage and business manager, and to attend rehearsals. The business manager could discipline those who refused to comply with the stage manager's directions, and efforts were made to ensure that all of the material was in good taste. The producer selected and co-ordinated material tendered by the artists from their own repertoires, decided on special theme weeks, selected artists for the opening chorus, finale and sketches, and decided on the accompanying music. *The court stressed the co-ordination and continuity of the show, and contrasted the situation with "the ordinary musical hall show" where "a separate bill is provided each week by transient artists who do their turns twice nightly for the week and have little or no relation to each other."* The question of control was dealt with as follows:

"The crux of the matter lies in the extent of the control exercised by the management. Broadly speaking, there can be no doubt that in some respects an artist is beyond the control of the management. It is his own individuality and personality that makes or mars him as an artiste. However much he be instructed or directed, it is the natural gift which counts. But the fact that the performance of a task depends on a natural gift or on some laboriously acquired accomplishment does not necessarily mean that the performer cannot be a servant. It is only in the most mechanical of operations that anyone can dictate absolutely the mode of performance. The nature of the task is not conclusive. An artisan may be an independent contractor while the most highly skilled technician is a servant. A skilled craftsman may have highly individual gifts and yet be under a contract of service. His value as a servant lies in his individuality and he is frequently employed just because he can exercise specialized skill which the employer does not possess. The employer of such a servant can direct the objective to which the servant's skill is to be addressed but he is powerless to control the manner in which the servant's skill is exercised. *It seems to me therefore to be beside the point to argue that an artiste, because he gives a unique individualistic performance which expresses his own personality, cannot be under such*

control by his employer as to make him a servant. If by his contract he has given to his employer the right to the benefit of his artistic gifts in circumstances which entitle the employer to say, You shall exercise your gifts in this play or this sketch in this theatre and with those collaborators over such and such a length of time, I think that by conceding to his employer such a measure of control he has entered into a contract of service. I do not think that one can ignore that the contract here is for a period of time, that the artiste agrees to play in any of the management's productions and may be transferred to other managements. Moreover, he is to play the parts set down for him. So far as the conditions in the contract are concerned, I do not lay much stress on the one which says that he agrees to comply with all the rules and directions and instructions of the stage manager and business manager. It points to control, no doubt, but some such provisions would be necessary to preserve discipline in the complex life of a theatre whether the contract were one of service or for services. What I find of more significance is the fifth condition, where "the artiste agrees to play the part (or parts) assigned to him (or her) during the whole run of the production, if the management so wishes, and on his (or her) part not to terminate this engagement until the finish of the production;..." This points to a definite contract of employment to serve the management by making his gifts available to the management in ways which the management can dictate over a period of time."

[emphasis added]

Although the court does not say so explicitly, a perusal of its reasons reveals elements of both the "organization test" and a "control test" — the latter being defined more broadly than was the case in *Gould v. M.N.I.* However, the contract in *Stagecraft* was much different from the one in the instant case, and the features which moved the court to find employee status are largely absent here.

53. The *Gould* case was reconsidered explicitly in *Whittaker v. Minister of Pensions and National Insurance*, [1966] 3 All E.R. 531. There, the claimant was a trapeze artist engaged by a circus on a contract for five weeks at a weekly salary. She was to give her exclusive services to the circus, to give a specified number of performances, to provide her own costumes and apparatus, and to take part in publicity activities as required. In addition, she was to assist at moves and in seating the audience, and, by a special clause, was to undertake full usherette duties. She ordinarily gave two seven minute performances per day and three on Saturdays, but she was also required to appear at all extra performances specified by management, as well as any special events, newsreels or broadcasts which might publicize the circus. On average, less than half her working day was spent on her own act and preparations for it; but because she was required to devote the *whole* of her working time to the company during the period of her engagement, the rest of her time was occupied by ancillary duties which had nothing to do with her particular skill.

54. The court distinguished the *Gould* case because of the hybrid character of the claimants' duties, — although it was acknowledged, (somewhat equivocally) that:

"had she only been obliged to perform her trapeze act, even if she had also been under various constraints and controls in relation thereto, there

would have been grounds for holding her contract to have been one for services”.

Of more interest is the degree to which the court minimizes the traditional control test, and emphasizes instead, the degree to which the employee's work is an integral part of the business. After referring to *Cassidy v. Ministry of Health*, [1951] 2 K.B. 343, and *Stephenson, Jordan and Harrison Limited v. MacDonald and Evans*, [1952] 1 T.L.R. 101, and noting the inappropriateness of applying the control test to a professional man or a man of some particular skill and experience, the court goes on to say:

“It seems clear, therefore, from the more recent cases that persons possessed of a high degree of professional skill and expertise, such as surgeons and civil engineers, may nevertheless be employed as servants under contracts of service, notwithstanding that their employers can, in the nature of things, exercise extremely little, if any, control over the way in which such skill is used. The test of control is, therefore, not as determinative as used to be thought to be the case, though no doubt it is still of value in that the greater the degree of control exerciseable by the employer, the more likely it is that the contract is one of service.

The earlier cases relying heavily on the “control” approach were distinguished because “of later authorities establishing that the degree of control exerciseable by the person employing another is of much less importance than was then thought to be the case”. The fact that she had to perform extra duties and devote *the whole of her working time* to the company was considered “markedly alien to the usual position of independent contractors”, and the court preferred to find employee status on the basis that the artist had to carry out her contractual duties as an integral part of the employer's business.

55. An earlier case which was referred to in *Stagecraft* (but not *Whittaker* or *Gould*), is *Performing Rights Society Limited v. Mitchell and Booker (Palais de danse) Limited*, [1924] 1 K.B. 762. There, the defendants ran a dance hall in which a band was engaged, and liability for the band's breach of copyright depended upon whether the musicians could be characterized as “employees” or “independent contractors”. The musicians were engaged to work seven hours a day, six days a week, Monday to Saturday, in any of the defendants' operations in London or elsewhere. The contract was for one year and prohibited the musicians from playing elsewhere, or making recordings, without permission. The musicians were required to comply with management's instructions concerning the nature of the music rendered, and the management was empowered to end the engagement, *inter alia*,; if the musician left the U.K. without permission; if any of them were intoxicated; if they were wilfully careless, inattentive or using improper language; or if they refused or neglected to follow the reasonable instructions of management. Throughout the contract, the word “employed” was freely used. In the circumstances, the court concluded that the musicians were employees.

56. Some of these cases are a little difficult to reconcile, but a key factor in *Gould* and *Radio City* seems to have been the artist's skill and the transitory nature of the relationship; while in *Ringling Bros.* or *Stagecraft*, the court was influenced by the longevity of the relationship with the employing unit, or the apparent integration of the entertainer into the employer's organization. Co-ordination *per se*, is not given overriding significance. Even self employed entertainers may be subject to house rules or have their acts co-ordinated with

others. It is part of the ordinary circumstances under which an entertainer works that the hotel or theatre engaging him will provide the stage, lighting and other accountments, and will control the length, timing, and even, to some extent, the content of his performance.

57. Counsel for the parties in the present case compared the dancers' situation with that of itinerant musicians, who move from engagement to engagement. Unfortunately, despite the existence of a musician's "union", we were unable to find any Canadian cases in which the employee status of musicians was determined in a labour relations context. In the United States, musicians are commonly regarded as employees; but there the NLRB has been heavily influenced by a long history of collective bargaining and the widespread use of a standard form contract which specifically provides that the club is the "employer", and expressly reserves to the employer the "right to control" the musicians' services. While the form of contract has not been the controlling factor in other contexts, the Board has been reluctant to go behind this particular "employment" contract (see for example *Reno Musicians Local 368*, (1968), 67 LRRM 50; *Independent Motion Picture Producers Association*, (1959), 44 LRRM 1265; and contrast the situation of composers who accepted assignments to write music for radio and television programmes. In *American Broadcasting Company*, (1957), 39 LRRM 1143, the Board applied the "right to control" test and determined that these composers were independent contractors.

58. Although few casual entertainers join unions, they do pay taxes, and it might be thought that some assistance could be derived from this branch of the law. But the Canadian tax cases are rather difficult to reconcile — although many of them refer to the decision of Rowlatt, J. in *Davies v. Braithwaite*, [1931] 2 K.B. 628 where the court found that an accomplished actress was self-employed because:

"a method of earning a livelihood which does not consist of obtaining a post and staying in it, but consists of a series of engagements . . . cannot be considered an employment but is a mere engagement in the course of exercising a profession."

These remarks are frequently quoted in cases in which independent contractor or "self-employed" status is affirmed; on the other hand, there are numerous cases in which "freelance" musicians are found to be employees. The most that can be said of these tax cases is that the Tax Appeal Board is less likely to find employee status: if the individual's income is derived from a variety of diverse sources; if his engagements are with institutions of varying size and character (rather than "establishment" organizations such as a symphony orchestra or the CBC); if the individual is a vocalist or guest artist rather than a member (albeit for a short term) of an established ensemble; if there is evidence of self-promotion or entrepreneurial activity; and if there is little control exercised by the alleged employer. Thus, in *Henrietta Carrick v. M.N.R.*, 55 DTC 56, an organist playing exclusively at a Montreal restaurant for four years at specified times and subject to a contract providing that "the employer shall at all times have complete control of the services which the employee will render under the specifications of this contract" was found to be an employee of the establishment. And in *Number 113 v. M.N.R.*, 53 DTC 308, an actor was employed by a "sponsor" to play such characters as the sponsor might require, in accordance with a contract providing for a weekly salary, restricting the artist's ability to work for competitors, requiring him to render his best services and conform to the rules set out by the sponsor and prohibiting him from improvising, extemporizing, or otherwise deviating from the script. The sponsor retained the

right to suspend performances for up to thirteen weeks without pay, and after one year the agreement provided for two weeks vacation with pay to be taken at a time agreeable to the sponsor. In the circumstances, the Tax Appeal Board again concluded that the individual in question was an employee. But in *Number 124 v. M.N.R.*, 53 DTC 426 and *Number 122 v. M.N.R.*, 53 DTC 399, the Board found that a comedian and “lyric and dramatic artist” were true freelance entertainers who could not be regarded as employees (see also: *Grondin v. M.N.R.*, 55 DTC 169; *David Rogers Pepper v. M.N.R.*, 54 DTC 104; *Harold Hunter v. M.N.R.*, 51 DTC 213; *Bradanovich v. M.N.R.*, 59 DTC 455; *James Collins v. M.N.R.*, 52 DTC 69; *Blunt v. M.N.R.*, 56 DTC 73).

59. The position of “media freelancers” has also been considered in several recent cases — some of which are relied upon by counsel for the applicant in support of her alternative submission that the dancers here are “dependent” contractors. In our view, all of these cases are distinguishable; but for the purpose of completeness we shall refer to them briefly.

60. In *Pacific Press Limited*, [1977] 1 Can LRBR 342, the union sought a determination of the legal status of a number of freelance reviewers working for one or the other of the two daily newspapers in Vancouver. Their functions were similar to staff journalists except that the need for their work was intermittent and they worked on a freelance basis. The evidence disclosed, however, that the “rhythm of their work patterns” was entirely determined by the newspapers which they purported to represent when doing their reviews. The individuals worked an average of approximately thirty-five hours a week for one of the two newspapers and were paid at a negotiated rate for each piece written. Indeed, because of the regular nature of the review functions, the individuals were paid a “retainer” for their work based upon their estimated monthly earnings. Percentages of income earned ranged from fifty per cent to ninety per cent from this work. The newspaper controlled the time in which the reviewer did his work, both in assigning a scheduled event and requiring the completed review by a fixed deadline. The newspaper also set standards of writing quality and while the reviewers were theoretically free to work elsewhere for practical reasons they were unable to do so. The newspaper retained the right to summarily terminate any reviewer who proved unsatisfactory. In the circumstances, the Board concluded that the freelancers were “dependent contractors” emphasizing the similarity of their functions to those of staff reviewers, their integration into the organization of the newspaper and the degree of practical control exercised over them. The longevity of the relationship, degree of economic dependance, and extent of integration into the alleged employer’s business all distinguish the situation in *Pacific Press* from that in the present case.

61. *Pacific Press* may usefully be compared with the decision of the NLRB in *Boston After Dark Incorporated*, (1974), 86 LRRM 1003. There, the Board concluded that certain freelance writers, cartoonists and photographers were independent contractors. The relevant legislation did not contain a “dependent contractor” provision so the Board’s choice was between “employee” or “independent contractor” status. Nevertheless, the dissenting decision of (then) Board Member Fanning is of some interest because of its emphasis on the test to be used in the case of freelancers:

“Unlike my colleagues, I would not exclude all so-called “freelance” writers, cartoonists, and photographers as a class merely because they are compensated on a piece-rate basis. There are other relevant factors which the majority opinion fails to consider.

The “right-of-control” test, which the Board uses so often in determining whether a person is an employee of an employer or merely an independent contractor, would appear singularly inapplicable when dealing with the personal services rendered by professional personnel such as the writers, cartoonists, and photographers involved in this case. Given the independent manner in which they do their work and the high degree of discretion utilized in connection with it, what is important to the Employer is the end result, the article or whatever finished product is anticipated. *In such instances, therefore, the Board has paid less attention to the “right of control” and more attention to an analysis of the degree to which the professional personnel have been integrated into the operating organization of the employing unit.* On the only occasion in which the Board has addressed the issue of employees status of newspaper reporters’ *Plainfield Courier-News Co.*, it found suburban correspondents of a city newspaper to be employees of the newspaper rather than independent contractors. In so doing, the Board relied heavily on the fact that the work of such correspondents was closely integrated with and constituted an essential part of, the employer’s business, notwithstanding, the facts that their earnings depended in part of the amount of, and quality of material they submitted, their supervision by their employer was minimal, and their method of compensation — a periodic sum of money without any deductions for taxes — differed from that of other unit employees. However, this crucial consideration of integration into the Employer’s operation was totally ignored by my colleagues in making their decision in the instant case.

There is no doubt that the contributions of so-called freelances are indeed an essential part of the Employer’s business. The record indicates that freelance articles constituted, on the average, approximately 50 per cent of the content of section 1 of the newspaper. Section 2, the arts section, comprises almost exclusively freelance contributions. *The ultimate question, however, is how many freelances have, by their own individual contributions, proved themselves so essential an element of the Employer’s repertorial effort as to be deemed employees of the employer rather than independent contractors. Put another way, how frequently must a freelance make contributions to the Employer’s weekly newspaper before he is to be regarded as an essential individual whose work has become highly integrated into the Employer’s business?* The answer to this question would define the class of employees to be included in the unit.” [emphasis added]

62. The fact that an individual is only engaged on a casual basis does not mean that he must be considered “self-employed”. In *Juillard School*, (1974), 85 LRRM 1129, certain casual “per diem” stage technicians were considered employees by the NLRB even though they were hired on a casual basis, because: many of them did work for long periods of time; they were paid an hourly wage, they worked the same hours, used the same tools and worked in close proximity with other production employees; and even those who were hired on only a short term basis could look forward to future re-employment. Although there was no formal rehire list, the evidence indicated that the school tried to re-employ individuals familiar with

its stage set up. Similarly, in *Market Investigations v. Min. of Soc. Security*, [1969] 1 Q.B. 173 a woman conducting interviews on a casual basis for a market research firm was found to be an employee. Neither the casual nature of the employment nor the absence of employment benefits was considered decisive. On the contrary, the court noted that the same would be true for casual kitchen help in a hotel. There was no entrepreneurial activity or risk taking, and, in the court's view no reason to consider the individual "self employed". However, there was also a permanent connection with a single employer, a training program, considerable control and a series of re-engagements.

63. One might also consider *Purple Heart Film Corporation*, [1979] OLRB Rep. Sept. 900; [1979] Can LRBR 445, where certain craftsmen, in the motion picture industry, who moved from project to project, were found to be dependent contractors; and *CBC* [1979] 2 Can LRBR 41 where certain freelance research officers who were treated in the same manner as employees were so found by the Canada Labour Relations Board. In the former case, the business relationship were much longer than in the case at bar, and there were also indications of potential re-employment. In the latter case, eighty per cent of the freelancers worked "9:00 to 5:00" five days a week, and were entirely economically dependent on the CBC. More than half of them had contracts for over six months. Income tax, unemployment insurance were regularly deducted and they had many of the same duties and privileges CBC's regular employees. While the present situation has some parallels with *Purple Heart*, neither case provides a close analogy.

64. From this survey of the legal landscape, and the special environment of the entertainment industry, we can now attempt to distil some of the features which individually, or in combination, have been relied upon to support a finding of independent contractor status. It is recognized of course, that a listing such as this must necessarily be somewhat artificial. The factors are interrelated, and one is often only the converse of the other. No one factor, in itself, will be significant. However, all of these matters were mentioned or relied upon in one or more of the cases to which we have already referred and, if present, support a finding that an individual is "self employed":

1. *The use of, or right to use substitutes.* It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour rather than one's own work and skill. This is significant however, only to the extent that it is the alleged employee who makes that decision.
2. *Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials.* These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual's own labour. On the other hand, reliance upon another's financial loss on capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.
3. *Evidence of entrepreneurial activity.* This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop

“clients”, the use of agents, and organizing one’s “business” (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a “chance of profit” or “risk of loss”; that is whether business acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.

4. *The selling of one’s services to the market generally.* If the purchasers of individual’s services are numerous and of diverse character, the individual looks more like an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a “dependent” contractor or employee — especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his “prime customer” is given priority.
5. *Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.* Of course, few independent contractors are entirely free in this regard, but the question is one of the degree. A “self-employed” person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has “tied his fortunes”.
6. *Evidence of some variation in the fees charged for the services rendered.* This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as “independent contractors”, and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser’s ability to pay, may indicate independent contractor or self employed status.
7. *Whether the individual can be said to be carrying on an “independent business” on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.* Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and “place” of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer’s organization. In the case of entertainers, the cases suggest that it may also be useful to determine the extent to which the artist’s material or co-workers are influenced

by the employer; that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered "integrated" into the employer's operation in the manner of an employee, if he is required to devote the *whole* of his working time during the period to the service of the employer, promote its organization, or fill in his "non performing" time with unrelated ancillary duties. (See: *Whittaker, supra.*)

8. *The degree of specializaiton, skill, expertise or creativity involved.* If these are dominant element in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of "integration" into the respondent's organization, the disputed individual is "self-employed" professional.
9. *Control of the manner and means of performing the work — especially if there is active interference with the activity.* However, it is the *right* to interfere rather than the *ability* to do so which is significant. The fact that a particular occupation involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship *at will* and *without cause* may indicate an employment relationship whether or not the employer exercises this power.
10. *The magnitude of the contract amount, terms, and manner of payment.* If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be "employees"; and independent professionals may charge an hourly rate rather than a block fee).
11. *Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.* The employer's established employee complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. if the so-called independent contractor substitutes for a firm's employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee.

IV

65. It was contended by counsel for the applicant that all of the dancers are employees

or, in the alternative, dependent contractors. It was contended by counsel for the Algonquin (and this position must also be considered in respect of the other hotels) that the dancers are “self-employed” independent contractors or, in the alternative, if they are employees, are employees of the agents rather than the hotels. The parties’ alternative submissions are the most easily disposed of. The dancers clearly cannot be considered employees of the agents — whether one uses the term “employee” in its ordinary sense, or as extended by the statutory definition of dependent contractor. The dancers do not perform work or services for the agents. They are not paid by the agents. They are not trained by the agents or in any real sense under their control. And neither the dancers nor the agents perceive their relationship as one of employer-employee. Nor do we think the dancers (other than Rachel Berchtold whose situation we will consider separately) can be considered to be dependent contractors of the various hotels. Section 1(1)(ga) makes it clear that the degree of economic dependence must be considered in relation to the person for whom the work is done. In *Craftwood Construction Company Limited*, [1980] OLRB Rep. Nov. 1613 the Board put it this way:

“Section 1(1)(ga) makes it clear that the issue of economic dependence is in relation to the person for whom the work is done. From the wording used, it is not readily apparent that the Legislature had in mind an “economic dependence” on a vast number of purchasers or on an entire industry. Rather, the words more reasonably reinforce the existing approach of this Board which has measured economic dependence by the degree of economic association with a particular purchaser of the service or work in question. Indeed, it is almost a tautology to speak in terms of dependence on an industry in the sense that almost everyone is dependent on the source of their income when the source is so widely defined. This is not to say, however, that it is impossible to be economically dependent on more than one person and thereby more resembling an employee in relation to each of the purchasers of the services in question. However, the number of such purchasers would have to be very limited and they would have to exercise a *de facto* control over the labour market — an oligopoly in economic terms if you will. The economic relationship with each person would, as well, have to be substantial and more or less regular.”

Here the dancers provide their services to literally dozens of different purchasers and there is no settled relationship with any of them. None of the dancers (except Rachel Berchtold) is economically dependent on any of these respondents, and in consequence, they cannot be considered dependent contractors.

66. The principal, and more difficult question, is whether the dancers are to be regarded as “self-employed” or “employees” of the various hotels at which they work from time to time. Before returning to the facts of this particular case, it may be useful to refer briefly to the “archtypical” employment situation as described by the British Columbia Labour Relations Board in *Cranbrook District Hospital* [1975] 1 CLRBR 42 as follows:

“What are those features which go to make up an employee in the usual sense of the term? Someone is interviewed by an employer and hired for a job. He will work for some period of time and will be paid a fixed wage, computed hourly, weekly or monthly. He will perform tasks assigned by the employer and subject to the direction and supervision of the latter.

This work is of benefit to the employer's business or enterprise. For that reason, it is worth the while of the employer, to pay for the doing of it. If the work is performed well, it will be so evaluated by the employer, and result in the retention or even promotion of the employee. If the work is not performed well, he will be disciplined and perhaps even discharged, again by the employer."

Of course, a situation such as that would not give rise to litigation. The source of the problem in the hard cases is that there are few elements in the definition of an employee which are both necessary and sufficient for the application of the concept, or which do not have to be qualified in a particular economic or industrial context. But however delicate a balance may have to be struck in penumbral cases, it is worth repeating, that such judgments about where the line is to be drawn, are not made in a legal vacuum. There are established common law tests, decisions of other courts or tribunals in related fields, and such guidance as can be gleaned from the structure and purpose of the statute itself. What is so striking about the present case, is the extent to which *none* of the other decisions, and so few of the established principles support a finding of employee status.

67. The entertainers are hired for the result they produce — entertainment, — and the hotel has no control, and no wish to control the manner in which they work. It is because they are hired to produce a specific result that the hotel has little concern for their identity or even whether they actually do the work themselves or arrange for substitutes. This is also the reason why the hotels can afford to take no direct role in selecting the performers and are largely unconcerned with the dancer's particular abilities. Of course, from the audience's point of view, each dancer gives a unique performance. This is why it is necessary to change them so regularly. But from the point of view of the hotel all that is important is the result. In how many employment relationships is the employer uninvolved in the selection or supervision of his employees, and entirely unconcerned about their identities or whether the work is done by them or someone else? Those characteristics are more often related to an independent contractor relationship.

68. The dancers are not subordinated or subject to the authority of the hotel management in the way that its other employees are. The dancers owe no duty of allegiance or fidelity, nor are they subject to managerial direction and control. As we have already mentioned, they can, and do, have their work performed by someone else. The nature of their work is quite different from that of other employees, and they are entirely free to come and go as they please, when they are not actually performing. The hotel prescribes the time and length of shows, but this is the extent of its involvement and it does not improve employee status. Some house rules would be equally applicable whether or not the dancers were self-employed. And how many employees even skilled or professional employees render service over a few days, in 15 minutes segments, being entirely free to do what they wish at other times? (Note: there is no indication of rehearsal, training or preparation time, or the development of an act to the specifications of the clients.) And how many "casual employees" have the range of choice or salary of these dancers?

69. The dancers develop their own acts which they sell to the general market. Their investment in costumes and props is not great but this, combined with their choreography, appearance, style, personality, and showmanship, comprise the package which the entertainer markets to the available buyers. While differences in quality or professional ability may not be appreciated by the hotel, the dancers certainly made that distinction themselves and indicated

that better dancers had more job opportunities at “better” clubs, more mobility, and more leverage with the agents. They do not really see themselves as employees of the various hotels or as subject to its direction like other employees. Such direction was resisted, and Finkel pointedly remarked that she provided her own costume to blend with her own style. She was not a waitress she said. The dancers regard themselves as freelance professional entertainers.

70. All of the dancers who gave evidence indicated that they had a great degree of discretion as to when and where they worked, and consequently, some measure of choice concerning working conditions and prices. As Mona Pierson put it she could “pick and choose”. The dancers could and did solicit business on their own behalf, and in addition used the services of one or more agents. If one agent’s choice of bookings was unsatisfactory there seems to be little difficulty in getting another. Debra Finkel certainly had no such problem. She found an alternative booking within a day, and was even able to secure a slightly higher price than the hotel was originally offering. And a demand to take her G-string off was refused, yet Finkel was not discharged. While the dancer does not have the same kind of opportunity for profit or risk of loss of some other self-employed entrepreneurs, neither are they in a position of economic dependence analogous to that of an employee. The situation is very different from that of the individual described by the U.S. Supreme Court in *Hearst Publications, supra* who was “helpless” vis a vis his employer, “dependent on his daily wages” and so tied to his job that he was unable to resist arbitrary treatment.

71. If one looks at the organization or integration test, the result is the same. The dancers fall precisely within the parameters enunciated by Lord Denning and (in a different context) by member Fanning of the NLRB. The dancers are not “part and parcel of” or “integrated into” the hotel’s business; but are merely “accessory to it”. The dancers are not “integrated into the operating organization of the employing unit”. To use the words of the British Columbia Labour Relations Board in *Pacific Press*, these respondents do not regulate the “rhythm of their work patterns”. They do not render exclusive service to the hotel engaging them, nor do they put themselves at the service of the hotel in any general sense. They perform no ancillary duties. The length of their contract never exceeds a week and there is no reasonable prospect of reengagement in the near future. While “entertainment” is an integral part of the respondents’ operations, none of the dancers can be considered part of the respondents’ operation or organization in any meaningful sense — especially when, even after they are engaged, they can have the work done by someone else if it suits them to do so.

72. Not one of the entertainment industry cases which we were able to find supports the applicant’s position. The features of control here relied upon to justify a finding of employee status were rejected by courts or tribunals in the United States in *American Guild of Musical Artists*, *Century Broadcasting*, *Strand Art Theatre*, *Radio City Music Hall*, *Ringling Brothers*, and *Ibis Enterprises*; and in the United Kingdom in: *Gould*, *Stagecraft*, and *Whittaker*. In *Gould* and *Stagecraft*, in particular, the Court was careful to point out that the existence of “house rules” was not significant, since rules of that kind were inherent in the running of an efficient entertainment operation — just as there must be precise rules concerning the time and length of show. The longevity of the relationship, which influenced the Court in *Ringling Brothers* and *Stagecraft* is here insignificant; and there is no “moulding” of the dancers’ acts into a total program, or any control of their collaborators or material. The dancers here are not part of an established company, show, or program. On the contrary, the circumstances here are similar to those of a casual entertainer working for a week in a vaudeville theatre. But that is the situation which the judges in *Ringling Brothers*, *Stagecraft*, and *Whittaker* all treated as the obvious example of the “independent contractor” from which

their own particular cases differed. Finally, although only engaged for a short period, the dancers do not serve the hotel exclusively or devote more than a small porportion of their time to its service — factors which influenced the Court in *Wittaker*. In summary, then, none of the cases which might support a claim that entertainers can be employees, support the applicant in this case.

73. Reference to the statutory purpose test is useful to resolve close cases or choose between alternative statutory interpretations, but the term “employee” is not infinitely elastic, and cannot be extended to all individuals in a position of economic dependence. Economic dependence is an inevitable feature of an interdependent economic order, and as we have already noted, none of the dancers is in fact economically dependent on any of these respondents. Nor is the kind of dependence which they do exhibit similar to that of most employees. They are dependent, if at all, on an industry. While the concept of employment can be stretched a fair distance, ultimately it must run up against its legal boundaries — especially in a jurisdiction which considered it necessary to amend the statute in order to encompass so-called “dependent contractors” who might not otherwise have been considered employees. Moreover, in considering the statutory purpose one must also consider the framework which the statute provides to accomplish it. Was that framework designed to accommodate persons who are entirely transitory, yet largely free to choose when and where they wish to work, or whether the work will be done by themselves or substitutes? Does certification make sense for a bargaining unit which will turn over completely at least three times before the application is even processed, and perhaps ten times if the Board decided to exercise its discretion to order a representation vote? and who would vote? The persons who originally supported the trade union would long since have left with little prospect of returning. Even the persons casting their ballots will have left before the count can be finalized and a formal certification issued. What does the statutory freeze mean in the circumstances? Who votes in a ratification vote? And to whom has the employer the right to present its final offer? We do not suggest that novelty, in itself, is determinative; for trade unions have been able to develop effective institutional responses to a special industrial environments. Thus, in the construction industry for example, the hiring hall, extended area bargaining master agreements and craft unionism, have all evolved to meet the problems of a unique economic context. Still, we do not think it is insignificant that a group of individuals who it is claimed are employees, do *not* fit easily into the framework of collective bargaining established for employees.

74. When all of the evidence is weighed in light of the established legal principles and case law, we are constrained to find that the casual entertainers whom the applicant seeks to represent, are “self employed” independent contractors rather than employees of the various hotels by which they may be engaged from time to time. While, no doubt there are some facets of the evidence which might support a finding that they are employees, when it is viewed in its totality, we do not think that conclusion can be supported.

75. The position of Rachel Berchtold serves to reinforce our general conclusion. Ms. Berchtold the house dancer at the Colonial is economically dependent on the Colonial in a manner analogous to that of an employee. She has worked at the Colonial on a full time basis for a number of months and expects to continue to do so. She does not have the same mobility or exercise the same range of choice as the other dancers. There is more control over her activities which must be co-ordinated more closely with that of the transient dancers. She is supposed to get every fourth week off; but has been required to work nevertheless. The number of her shows has been increased and decreased unilaterally, as has the price paid. There was more concern for her “image” than there was at the other hotel, more direct contact

with management, and more of a feeling on her part that these had to conform to management's expectations. In short, she is in a position of economic dependence more closely resembling that of an employee than an independent contractor, and in consequence can be regarded at least as a dependent contractor and perhaps as an employee. For the purpose of this decision, it is unnecessary to make that determination.

76. For the foregoing reasons therefore the Board finds that the two house dancers are employees within the meaning of the Act, and that the other dancers are not.

77. The effect of this finding is that the applications in respect of the Algonquin, Waverley and Carousel must be dismissed, because there were no "employees" in the bargaining unit at the time the application was made. The same cannot be said for the Colonial. In the case of the Colonial, there were two employees within the meaning of the Act who may have been members of the applicant. The Board does not have sufficient information before it to determine the membership support for the applicant as at the terminal date; nor have the parties had the opportunity to address themselves to the impact of the Board's employee status finding on the overall status of the applicant as a trade union. Accordingly the registrar is directed to relist the matter, so that in respect of the Colonial, the applicant can address all outstanding issues (other than the narrow issue with which the other panel is seized.)

1820-77-R Ontario Nurses' Association, Applicant, v. Arnprior and District Memorial Hospital, Respondent, v. Group of Employees, Objectors

Reconsideration – Bargaining unit – Board determining bargaining units having regard to parties' agreement – Respondent seeking reconsideration after three years – Whether Board exercising discretion to reconsider – Whether matter to be resolved by arbitration

BEFORE: R. A. Furness, Vice- Chairman, and Board Members D. B. Archer and W. H. Wightman.

DECISION OF THE BOARD; August 25, 1981

1. In a decision dated April 12, 1978, the Board issued two certificates to the applicant with respect to two bargaining units. The two bargaining units, which were determined having regard to the agreement of the parties, were defined as follows:

all registered and graduate nurses employed by the respondent at Arnprior engaged in a nursing capacity, save and except head nurses, persons above the rank of head nurse, in-service co-ordinator and persons regularly employed for not more than twenty-four hours per week

— and —

all registered and graduate nurses employed by the respondent at

Arnprior engaged in a nursing capacity who are regularly employed for not more than twenty-four hours per week, save and except head nurses, persons above the rank of head nurse and in-service co-ordinator.

2. In a letter to the Board dated April 29, 1981, the respondent has stated:

Re: Ontario Nurses' Association, and Arnprior and
District Memorial Hospital

By decision of the Board dated April 12, 1978, the Union was certified as the bargaining agent for the unit as set out in the certificate, a copy of which is enclosed herein. Subsequent to the Board's decision the Arnprior and District Memorial Hospital Nursing Home has commenced operations. The Union has since claimed that pursuant to the bargaining unit description as outlined in the aforementioned certificate the Union holds the bargaining rights for employees of the Arnprior and District Memorial Hospital Nursing Home.

The hospital hereby makes application pursuant to Section 95(1) of *The Labour Relations Act* for a reconsideration of the Board's decision in order to clarify the status of the trade union vis-a-vis employees of the Arnprior and District Memorial Hospital Nursing Home.

3. In a letter to the Board dated May 11, 1981, the group of employees advised the Board that they are not affected and do not wish to take a position with respect to the status of the applicant vis-a-vis the employees of the Arnprior and District Memorial Hospital Nursing Home.

4. In a letter to the Board dated May 27, 1981, the applicant has stated:

RE: ONTARIO NURSES' ASSOCIATION AND
ARNPRIOR AND DISTRICT MEMORIAL
HOSPITAL

Further to our letter of May 11th, 1981, we would advise that we are opposed to a reconsideration.

The Arnprior and District Memorial Hospital includes a ward described as the "Nursing Home", which consists of one half of a Hospital floor. The nurses who work on this floor are employed by the Hospital, paid by the Hospital, and are dealt with by the Hospital in the same manner as all other registered nurses who work on the various floors of the Hospital. This situation was in existence at the time of certification.

The Ontario Nurses' Association was certified on April 12th, 1978 as the bargaining agent for a full-time bargaining unit and a part-time bargaining unit.

The full-time bargaining unit was described in the certificate as follows:

"All registered and graduate nurses employed by Arnprior and

District Memorial Hospital at Arnprior engaged in a nursing capacity, save and except head nurses, persons above the rank of head nurses, in-service coordinator and persons regularly employed for not more than 24 hours per weeks."

The part-time bargaining unit was described as follows:

"All registered and graduate nurses employed by Arnprior and District Memorial Hospital at Arnprior engaged in a nursing capacity, who are regularly employed for not more than 24 hours per week, save and except head nurses, persons above the rank of head nurse and in-service coordinator."

At the certification hearing, no objection was taken by the Employer or the objectors to the inclusion of the so-called "Nursing Home Unit" nurses in the bargaining unit. The only disagreement between the parties was in regard to charge nurses, head nurses, supervisors and in-service coordinators, and this was resolved by the agreement of the parties which resulted in the description of the bargaining units contained in the certificates. We are enclosing a copy of the Board's decision reciting the parties' agreement.

The parties subsequently entered into two Collective Agreements, one part-time and one full-time. The full-time Collective Agreement contained the following scope clause:

"The Employer recognizes the Association as the exclusive bargaining agent for all registered and graduate nurses employed by the Arnprior and District Memorial Hospital at Arnprior engaged in a nursing capacity, save and except head nurses, persons above the rank of head nurse, in-service coordinator and persons employed part-time."

The part-time collective Agreement includes the following recognition clause:

"The Employer recognizes the Association as the exclusive bargaining agent for all registered and graduate nurses employed by the Arnprior and District Memorial Hospital at Arnprior engaged in a nursing capacity, who are regularly employed part-time save and except head nurses, persons above the rank of head nurse and in-service coordinator."

No objection was taken by the Employer during negotiations in regard to the so-called "Nursing Home Unit" nurses.

After the Collective Agreements were signed and in operation, the Association noticed that no dues were being deducted for the nurses on the Nursing Home Unit floor. The association filed a grievance which is proceeding to arbitration. The Hospital refused to appoint a nominee to this Board of Arbitration. The association then applied to the Office of

Arbitration for the appointment of a nominee on the Hospital's behalf. The Hospital objected to the appointment of a nominee and the parties attended at the Office of Arbitration and argued their positions in this respect. Ms. Jean Read subsequently decided that a nominee should be appointed for the Employer. She then wrote to the Hospital requesting that it appoint a nominee. So far, no nominee has been appointed. The Association recently wrote to the Office of Arbitration requesting again that a nominee be appointed on behalf of the Hospital.

The Association requests that the Board decline to enter into a reconsideration of this case for the following reasons:

- (1) The description of the bargaining unit in the certificates issued to the Association, which the Hospital now seeks to vary, were arrived at by the agreement of the parties. The Employer was represented by the same Counsel at the certification hearing and was given a full opportunity to make any representations at that time. The Association submits that the Board should not allow a party to repudiate its agreement which was clearly set out in the Board's decision dated April 12th, 1978. Moreover, if the Hospital felt that there was any need for clarity in the bargaining unit descriptions, this issue should have been raised at the time of the parties' agreement or at the certification hearing. The Board has said in *Kenora Motor Product Limited*, [1966] O.L.R.B. Reports 540 at page 541:

"When parties enter into voluntary agreements with respect to bargaining units and the exclusion and inclusion of persons in such units, the responsibility for clarifying the nature and extent of the agreement rests solely with the parties and the Board having once acted on the agreement of the parties is not in a position to vary or revoke such agreement."

- (2) The Hospital has apparently sat on its objection to the inclusion of the Nursing Home Unit nurses in the bargaining unit for approximately three years. In effect, it is asking for a reconsideration based on its own failure to raise this objection at certification. While we submit that this would not be an appropriate ground for a reconsideration in any event, the Hospital's delay further emphasizes this point.
- (3) The Hospital is not alleging that there was an error of law in the Board's decision, newly discovered evidence, fraud, etc. They are simply asking to vary a certificate three years after the fact because they have decided that Nursing Home Unit nurses should not be included in the bargaining unit. We submit that there is some question as to whether the Board has the jurisdiction to vary a certificate in these circumstances and that in any event, if it does have the jurisdiction, it should decline to exercise such jurisdiction here. To

do otherwise would open the door to a flood of applications to vary certificates by way of reconsideration wherever there is any subsequent dispute as to who is included in the bargaining unit. We submit that it is not the usual purpose of a reconsideration to deal with subsequent events or subsequent disputes a substantial period of time after the Board's decision. To decide otherwise would mean that no certificate is ever final.

- (4) This is particularly true where the parties have entered into a Collective Agreement and the dispute is one concerning the recognition clause of the Collective Agreement. The Hospital filed this application for reconsideration only after the Association had filed a grievance under the recognition clause. For all intents and purposes, the Hospital is in effect asking the Board to modify the recognition clause of the Collective Agreement. We submit that the Board has no jurisdiction to do so. (*Falconbridge Nickel Mines Limited*, [1964] O.L.R.B. Reports December 440)
- (5) The proper forum for the resolution of the dispute between the parties in regard to whether the Nursing Home Unit nurses are included in the bargaining unit is a Board of Arbitration, constituted under the terms of the Collective Agreement. The Association has taken every step possible to constitute such a Board. The Hospital will have a full opportunity to make any submissions and present any evidence they wish at a hearing of the Arbitration Board in regard to whether the Nursing Home Nurses should be included in the bargaining unit. There is no prejudice to the Employer in having the dispute resolved in the proper forum.

However, the Employer has attempted to obstruct the constitution of the Board of Arbitration at every opportunity.

When the parties attended at the Office of Arbitration to argue their positions with Ms. Jean Read, the Hospital argued that the nurses were not employees of the Hospital and that a Board of Arbitration would have no jurisdiction to determine the question. The Association argued that the Board of Arbitration had jurisdiction to decide its own jurisdiction, and that in any event, it had concurrent jurisdiction with the Labour Board to determine whether the nurses were employees provided that the question had not been referred to the Labour Board. (*Re Canadian Industries Limited*, 27 D.L.R. (3rd) 387)

We submit that the Hospital's application for reconsideration in this context is simply an attempt to avoid the jurisdiction of the Board of Arbitration and that the Labour Board should decline to entertain a reconsideration in these circumstances.

- (6) Even if the Labour Board did vary the certificates, it would not

resolve the dispute between the parties which involves the application of the Collective Agreement to these nurses. The only effect would be to retroactively strip the Association of bargaining rights for employees for whom it has negotiated two Collective Agreements. The Association submits that the Board should not exercise its jurisdiction to bring about such an illogical result which is not in the interests of stable labour relations.

- (7) Since the date of the certification, the Hospital has initiated construction of another building to be called the Arnprior and District Memorial Hospital Nursing Home. However, it is the Association's understanding that the construction has not yet been finally completed and no bargaining unit employees have been hired. We submit that it would be contrary to the Board's usual practice to make a decision about employees who are not yet in existence. In any event, the construction of this building and the hiring of nurses for it are events which took place subsequent to the certification hearing and as such should not be grounds for a reconsideration. (*Frito-lay Inc.*, [1968] O.L.R.B. Reports 324).

If and when nurses are hired by the Hospital to work in the nursing home building, the Association will examine the situation at that time and decide whether to file a grievance if the Employer refuses to apply the Collective Agreement to those nurses. However, it would still be the Association's position that the proper forum for resolving a dispute in regard to the application of the Collective Agreement to nurses hired for the nursing home building would be a Board of Arbitration, rather than the Labour Board. The simple fact that the Hospital may have decided to hire new employees for another building does not provide any valid reason why the certificate should be varied by way of reconsideration. Once again, the Hospital will have a full and fair opportunity to make any submissions and call any evidence they wish at the hearing of the Board of Arbitration and the Board of Arbitration will have full jurisdiction to determine whether the new hires are employees and whether they are covered by the recognition clause of the Collective Agreement.

In conclusion, we would ask the Board to decline to enter into a reconsideration of its decision of April 12th, 1978.

5. In a letter to the Board dated June 2, 1981, the respondent has stated:

Re: Arnprior and District Memorial Hospital and Ontario
Nurses' Association

We are in receipt of the letter from the Union dated May 27, 1981, and have reviewed the contents thereof with interest.

Unfortunately, there are several statements in the letter which do not

correspond with the facts relating to the history of the Nursing Home. Specifically, the Hospital disagrees with the following statements:

1. While we accept that the Association was certified on April 12, 1978, the Nursing Home did not commence operations until September 1, 1978, and employees of the Nursing Home were first hired on or after September 1, 1978. The commencement of operations of the Nursing Home took place well after commencement of negotiations of the collective agreement as it applied to Hospital employees. The Hospital was therefore not in a position to raise any objection or qualifications regarding a Nursing Home or Nursing Home employees at the time of certification, as neither existed at the time of certification.
2. The Hospital disputes the statement that nurses employed in the Nursing Home are dealt with by the Hospital in the same manner as nurses who work on the various floors of the Hospital. All employees of the Nursing Home work under separate management and supervision who establish working conditions for these employees. Nursing Home employees are paid under a different payroll by cheques from the Nursing Home. There is no intermingling or exchange of duties or responsibilities between employees of the Hospital. For the reasons stated earlier, the Hospital disagrees with a statement that these conditions could have existed at the time of certification.
3. In the course of negotiations, the Hospital on several occasions formally took the position that the collective agreement which was being negotiated for nurses of the the Hospital was not intended to apply to nurses employed in the Nursing Home. The position taken by the Hospital was not in response to a proposal by the Union to negotiate the terms and conditions on behalf of Nursing Home employees. It was raised on the Hospital's own initiative pursuant to the commencement of the Nursing Home operations during the negotiation of the Hospital agreement. The Union did not state any disagreement with the Hospital's position and on at least one occasion indicated that it accepted the Hospital's position on that point.
4. It is interesting to note that the reply by the Hospital to the application for certification did not list any Nursing Home employees and the list of employees as submitted by the Hospital was not challenged with respect to the absence of any Nursing Home employees. If, as the Union states, Nursing Home employees were employed at the time of certification, and intended to be claimed under the one application, that no objection was raised to the absence of nurses employed by the Nursing Home on the schedules of names.
5. The first indication that the Union intended to claim bargaining

rights for employees of the Nursing Home took place after the Hospital collective agreement was executed, by way of grievance. The Hospital immediately and consistently thereafter maintained the position that employees of the Nursing Home did not come within the terms of the agreement relating to employees of the Hospital. The Hospital therefore objected to the Minister establishing a board of arbitration and requested that the jurisdiction of the Minister's authority be referred to the Ontario Labour Relations Board pursuant to Section 96, subsection (1). Since the Minister has declined to refer the matter to the Board, the Hospital has applied to the Board for a clarification and reconsideration of the Board's application by letter dated April 29, 1981.

6. The Hospital objects to a statement suggesting that the parties negotiated a recognition clause to include employees of the Nursing Home. In fact, the Hospital went on record during the course of negotiations that the recognition clause would not apply to employees of the Nursing Home.

It would be our position before the board that, since the Nursing Home did not exist at the time of certification, the certificate is limited to employees of the Hospital. Furthermore, if it was the intention of the Union to expand the scope of the certificate to include the employees of the Nursing Home, it was incumbent on the Union to apply for a variation of the certificate prior to the execution of the collective agreement, or alternatively, to negotiate an amendment to the recognition clause which would expressly expand the scope of the bargaining rights to include the employees of the Nursing Home. The Union did not seek either of these remedies.

As the Union's claim has the effect of expanding the bargaining rights, the Hospital is hereby requesting that the matter be placed before the Board in order to determine the scope of the bargaining rights that had been granted. The Hospital is not asking the Board to vary the scope of the certificate at this time, but to clarify whether or not that certificate intended to cover employees of the Nursing Home in view of the fact that the Nursing Home did not come into existence until some four months after the issuance of the certificate.

In view of the major disagreement with respect to the facts surrounding this issue, I do not propose to respond to the arguments raised by the Union in its letter of May 27, 1981, relating to the facts as outlined by the Union. We do, however, reserve the right to make further submissions to the argument should it become necessary.

6. The respondent is requesting the Board to reconsider its decision in this matter dated April 12, 1978. This request has been made more than three years after the Board, having regard to the agreement of the parties, determined two appropriate bargaining units

and issued two certificates to the applicant. There appears to be no dispute between the applicant and the respondent that at least one collective agreement has been entered into with respect to each of the bargaining units which were initially determined by the Board. There is also no dispute that the applicant has filed a grievance with respect to the interpretation, application, administration or alleged violation of these collective agreements and has endeavoured to have this grievance heard by a board of arbitration. It is clear that the respondent has opposed the placing of the grievance before a board of arbitration.

7. The Board has the jurisdiction to reconsider, vary or revoke any of its decisions, orders, directions, declarations or rulings pursuant to section 95(1) of the Act. However, the Board has a discretion in the exercise of its jurisdiction under section 95(1). The two bargaining units were determined having regard to the agreement of the parties and collective agreements were entered into on the basis of these bargaining units. The respondent has permitted a period of three years to elapse before requesting reconsideration under section 95(1). As Osler, J., observed in *Regina v. Ontario Labour Relations Board, Ex parte Lakehead Registered Nursing Assistants Bargaining Association*, [1969] 2 O.R. 597, at page 603, the Board is well known to take the view that when an agreement has been made following certification, the bargaining rights of the parties flow from the agreement rather than from the original certification. Indeed, the parties appear to have varied the description of the bargaining units which are contained in the two collective agreements.

8. The parties agreed on the description of two bargaining units at the time of certification and differences of opinion have arisen concerning the interpretation, application, administration or alleged violation of two collective agreements. The description of the two bargaining units in the decision of the Board dated April 12, 1978, was determined on the agreement of the parties and the time to seek clarification of the descriptions of the bargaining units was at that time. The Board notes that the Board in its decisions, at the request of one or more of the parties, frequently includes clarity notes with respect to the inclusion of certain persons or classifications in or from a bargaining unit.

9. In our view, the disputes between the applicant and the respondent result most directly from a difference of opinion concerning the application and interpretation of the collective agreements. The circumstances which surround this request are in many ways similar to the facts in *Norfolk Hospital Association v. London and District Building Service Workers Union, Local 220*, 77 CLLC ¶ 14,094, where a board of arbitration ultimately made a determination of a grievance under a collective agreement. In the circumstances of this application, the Board is not prepared in the exercise of its discretion under section 95(1) to reconsider its decision in this matter dated April 12, 1978. The applicant and the respondent have entered into collective bargaining relationships and the dispute between them must be regarded as flowing from the application and interpretation of the two collective agreements and not from the decision of the Board. In our opinion, the differences between the parties are most appropriately to be resolved by a board of arbitration.

0781-81-U Betty Lavoie, Complainant, v. Office and Professional Employees International Union, Local 343, Respondent, v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Intervener.

Collective Agreement – Duty of Fair Representation – Section 60 – Grievor discharged long after last collective agreement expired – Union not processing grievance under expired procedure – Whether grievance may be processed under agreement that had expired at time grievance arose – Whether union has duty to provide funds for court action

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: Vicki Robson, A.F. DeLuca and Betty Lavoie for the complainant; John Elder and Kathy Maddison for the respondent; S. B. D. Wahl and J. Harrower for the intervener.

DECISION OF THE BOARD; August 27, 1981

1. This is an application under section 79 of *The Labour Relations Act*. The grievor, Mrs. Betty Lavoie alleges that the respondent OPEIU has contravened sections 14 and 60 of the Act. Those sections read as follows:

Section 14

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

Section 60

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Since both the respondent and the intervener are trade unions, it will be convenient to refer to the former as “the employer” or “the Ironworkers”, and the latter as “the union” or “the OPEIU”.

2. Most of the facts underlying the present complaint are not in dispute. Mrs. Lavoie has been employed by the Ironworkers for 27 years. On August 23rd, 1980 she was discharged. She filed a grievance alleging that her discharge was without just cause. Her union, the OPEIU, concluded that, in the rather unique circumstances of this case, there was no legal basis for taking her grievance to arbitration. It is this decision which underlies Mrs. Lavoie’s

contention that her union has acted in manner which is arbitrary, discriminatory, or in bad faith.

3. The OPEIU has been the bargaining agent for the Ironworkers' office staff since 1966. There have been a series of collective agreements since that time. The most recent agreement expired on August 15th, 1977. Shortly before the expiry of that agreement, the OPEIU served notice of its desire to enter into negotiations for a new agreement to replace the one which was about to expire. Positions were exchanged, and there were meetings between the union and the employer on December 17th, 1977 and February 4th, 1978. These meetings did not resolve the matters in dispute. The employer applied for the appointment of a conciliation officer, an officer was appointed, and a further meeting was held in early 1978; but again, the parties were unable to resolve their differences. On September 21st, 1978 the Minister advised the parties that he did not consider it appropriate to appoint a conciliation board. Accordingly, the parties were free to continue bargaining with the prospect that within fourteen days, either of them would be in a position to resort to the economic sanctions of a strike or lock-out. Neither occurred. In late October 1978, at the request of the union, the Minister of Labour appointed a mediator, but his intervention too, proved unsuccessful. The impasse remained and no new collective agreement was concluded.

4. Following the completion of the conciliation process in September 1978, Kathy Maddison, a business agent for the OPEIU discussed with Mrs. Lavoie and Ms. Tragunna, the other employee in the bargaining unit, the possibility of engaging in a strike to put pressure on their employer to reconsider its position. Maddison indicated that the union could provide whatever support it could if the employees decided to go on strike. Neither of them was prepared to do so at that time; however neither were they prepared to accept a collective agreement on the employer's terms. Maddison was in contact with the two employees periodically thereafter, but their position did not change. As winter approached Mrs. Lavoie told the Board that she and her co-worker were reluctant to contemplate a strike. In the spring, they were optimistic that the upcoming elections in the Ironworker's Union (scheduled for August 1980) would bring about a change in the bargaining climate. It did not; moreover, shortly thereafter, Local 700 was put under trusteeship. The trusteeship created new uncertainties which reinforced the employees' reluctance to strike or otherwise press for new negotiations. In consequence, when Mrs. Lavoie was discharged in August 1980, there was no collective agreement in existence, and had been no collective agreement in existence, and had been no agreement for some considerable time. But it was the collective agreement, now long expired, to which Mrs. Lavoie looked for her right to file a grievance and go to arbitration.

5. It is worth emphasizing that throughout this period the union did not abandon the employees. It was abiding by their instructions, that for one reason or another, the time was inopportune for pressing their bargaining demands or engaging in a strike. For its part, the employer did not consider it necessary to lock the employees out as it was legally entitled to do. In the circumstances, it is a little difficult to see what more the union could have done to advance the employees' position. There was really no basis for applying for further conciliation since there was no prospect that a third mediator would have any more success in bridging the gap between the parties than his predecessors. There was no indication of any change in their positions or any increased willingness on either side to make concessions.

6. The grievor contends that the OPEIU has failed to "bargain in good faith" and make every reasonable effort to make a collective agreement. There is no merit to this

contention. The OPEIU did what it could under difficult circumstances. Even assuming that the grievor has status to bring a complaint of a violation of section 14 (the section appears to create rights and obligations only between the employer and the union, not between the union and its members-see: *Canadian General Electric*, [1980] OLRB Rep. Aug. 1179), there is no basis for such complaint in this case.

7. As we have already noted, the grievor was terminated on August 23rd, 1980. Mrs. Lavoie testified that the culminating incident was her handling of a subpoena, but the employer's stated reason for discharge was "persistent and habitual absenteeism and lateness as well as unsatisfactory work performance". There is clearly some substance to the employer's concern. It is acknowledged that following the death of Mrs. Lavoie's husband in 1975 she had a series of debilitating physical and emotional problems. She was off work for more than a year, from January 1977 to February 1978. Following her return in February 1978, she was terminated and filed a grievance which the union took to arbitration on her behalf. The case settled following the commencement of the arbitration proceeding, on the basis that Mrs. Lavoie would be "on probation" for a six month period during which she would be expected to maintain regular attendance at her job.

8. This was not the only grievance which the OPEIU took to arbitration on the grievor's behalf. An earlier grievance concerning her entitlement to sick pay was also taken to arbitration and resulted in an award in her favour. There is obviously no unwillingness on the union's part to take cases which, in its view, have some prospect of success. Nor is there any evidence whatsoever that the union has discriminated against Mrs. Lavoie or acted in bad faith. All of the evidence points to precisely the contrary. Mrs. Lavoie admits that she has had no complaints against the union other than the one arising out of her discharge. She even had Ms. Maddison's home phone number, and never had any difficulty reaching her to discuss her problems.

9. The union's treatment of Mrs. Lavoie's discharge grievance was not arbitrary, uncaring, or perfunctory. Ms. Lavoie's grievance was not dismissed out of hand. The grievance was accepted, and Ms. Maddison attempted to arrange a meeting with the employer to discuss the situation. The employer, however, took the position that since the agreement had long since expired, there was now no basis for claiming a contravention of its terms, or processing a grievance in accordance with a grievance procedure which was no longer in effect. This position, it will be observed, is probably correct in law, and is certainly supported by the preponderance of arbitral and judicial authority. (See most recently the Ontario Supreme Court decision in *Re Bell Canada and Communications Union Canada* (1979), 23 O.R. (2d) 701). Ms. Maddison, on behalf of the OPEIU, was not sure. She considered it appropriate to obtain an independent legal opinion and she obtained the authorization of the union executive board to to expend funds for this purpose.

10. The solicitors' opinion substantially confirmed the employer's position that one could not found a claim on the basis of a collective agreement that had expired by the time the complaint crystalized. In addition, having acknowledged the expiry of the old agreement and undertaken repeated efforts to replace it with a new one, the union's solicitors pointed out that it might well be estopped from contending that the old agreement continued in effect. On the basis of that opinion the union decided that there was no purpose in proceeding to arbitration with a claim which appeared certain fail. An arbitrator would have no jurisdiction to decide whether Mrs. Lavoie's absenteeism justified her discharge, because the contractual provisions

restricting the employer's right to fire employees were no longer available. The union was not unsympathetic to Mrs. Lavoie's claim — indeed, quite the opposite. It was simply that, on the basis of the legal advice it had received, there appeared to be little the union could do about it. And, while it may be unnecessary to do so, we might note that the position taken by the employer and confirmed by the solicitors for the OPEIU appears to be a correct statement of the law as it currently exists. In the absence of a collective agreement, there is no restriction on an employer's right to discharge an employee, except that imposed by the common law; and *The Employment Standards Act*. Neither rights can be enforced by an arbitrator.

11. Can it be said that the decision not to proceed to arbitration with Mrs. Lavoie's case is "arbitrary, discriminatory, or in bad faith"? There is no evidence whatsoever of discrimination or bad faith. On the contrary, the evidence indicates that in this, as in previous problems which she has had, the union did all that it could; and it cannot be considered "arbitrary" when a union decides not to proceed with a case which its own solicitors advise is without legal foundation and bound to fail. We would be disinclined to interfere with such decision in any case (i.e. to "second guess" the union's lawyers) but we certainly do not think we should do so when in our view those lawyers were right.

12. Is there anything more that the union could or should have done for Mrs. Lavoie? It is difficult to deal with this question in the abstract. The problem is, that following her receipt of a copy of the lawyer's opinion, Mrs. Lavoie made no effort to contact the union, or explore other possibilities. She simply filed a complaint with this Board alleging that her union was in breach of its statutory duty; and in this regard, it is perhaps significant that the only relief claimed in that application is that the grievor be reinstated or, alternatively, that this Board direct the employer and union to adhere to the terms of the agreement which expired some three years ago. In argument, and in response to questions from the Board, counsel for the complainant suggested other courses of action which the union might have taken; and accordingly other relief which this Board might direct. But if counsel did not contemplate these possibilities in framing the relief requested in the grievor's complaint, and if these possibilities were never suggested to the union, how can the union be reasonably expected to have acted upon them, and how can one find the union in breach of section 60 for not doing so?

13. It was suggested in particular, that the union should provide the funds, and absorb the costs, if the grievor commences a civil action in the Courts against her former employer. There are several difficulties with this proposition. In the first place, as we have already noted, there is no evidence that this suggestion was ever made to the union, and it is a little difficult to find that the union has broken the law by refusing to volunteer. More fundamentally, a civil action involves the assertion of common law rights which are personal to the grievor, and entirely remote from the sphere of collective bargaining in which the union operates and to which section 60 was intended to apply. Within the collective bargaining realm, the trade union is, by statute, the employee's exclusive bargaining agent, and an employee is unable to bargain on his own behalf or even act unilaterally to assert his rights under a collective agreement. In this context, it is easy to understand why the Legislature would impose upon the union a statutory obligation to act fairly. But the trade union has no right to bring a civil action on behalf of an employee, and could not be a party to that proceeding. A civil action has nothing to do with the employee's collective bargaining rights either directly or indirectly. Since a common law Court (unlike an arbitrator) cannot order the employee reinstated, the grievor's connection with her employer, the bargaining unit, and her union has now been permanently severed. Her sole remedy is in terms of damages *if* she is able to prove, contrary to

her employer's assertion, that her absenteeism did not justify her termination. It is one thing to assert that a union must act fairly within the context of collective bargaining; it is quite another to suggest that the union has an obligation in respect of the personal, civil or common law rights of a former bargaining unit employee. We do not think that section 60 was ever intended to extend that far or that the union could be breaching its obligation as bargaining agent by failing to fund a collateral civil action.

14. The intervener raised an additional "technical" argument going to the jurisdiction of the Board. When Mrs. Lavoie was discharged, she was no longer an employee in the bargaining unit. Ordinarily, section 1(2) of the Act would apply to this situation. That section provides that an individual who is discharged contrary to a collective agreement or the Act, remains "an employee" for the purpose of proceedings under the latter. But here, Mrs. Lavoie was not discharged contrary to the Act nor was she discharged contrary to a collective agreement — there being none in existence. Thus, claims the intervener, she was not an *employee* in the bargaining unit when she launched the present complaint (i.e. about eleven months after her discharge), and section 60 can have no application to her. Since we are satisfied that there has been no breach of section 60 in any event, it is unnecessary for us to decide this question.

15. For the foregoing reasons, this application must be dismissed.

1966-80-M United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67, Applicant, v. Braneida Mechanical Service Ltd., and Oliver Plumbing and Heating Limited, Respondents

Sale of a Business – Section 112a – Whether transfer or sale of construction business – Whether sale only of tools and equipment – Whether purchaser bound by provincial agreement

BEFORE: Ian Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Stanley Simpson and Trevor G. Byrne for the applicant; Peter Quinlan, John P. Oliver and Donald R. Herbison for Braneida Mechanical Service Ltd.; L. T. Oliver for Oliver Plumbing and Heating Limited.*

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER H. J. F. ADE; August 28, 1981

1. Oliver Plumbing and Heating Limited is hereby added as a party respondent to these proceedings.

2. These proceedings were commenced as a referral of a grievance to the Board under section 112a of *The Labour Relations Act* alleging that the respondent Braneida Mechanical

Service Ltd. ("Braneida") was in violation of a provincial agreement between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada which is binding on the applicant.

3. It is not disputed that neither the applicant nor any other local of the Ontario Pipe Trades Council has been certified or voluntarily recognized as the bargaining agent for employees of Braneida. However, the applicant has for some forty years been the bargaining agent of certain employees of the respondent Oliver Plumbing and Heating Limited ("Oliver"). It is the contention of the applicant that there has been a sale of a business from Oliver to Braneida and that pursuant to section 55(2) of the Act Braneida is bound by the terms of the provincial agreement referred to above.

4. It should be noted that in its filings the applicant also took the position that section 1(4) of the Act was applicable to the facts of this case, but it abandoned this contention during the hearing.

5. All of the shares of Oliver are currently held by Mr. Len Oliver and his wife. Len Oliver's father began the business in 1921 as a plumbing and heating contractor, although the firm was not formally incorporated until 1947. Len Oliver joined the Oliver firm in 1945 and at some point, the date was not given in evidence, he took over the running of the company. Under Len Oliver the company engaged in the design and installation of plumbing, heating, air conditioning, ventilating and sprinkler systems.

6. During the 1960's and the early 1970's, Oliver was a highly successful operation, frequently being engaged on contracts worth over half a million dollars. At its peak, the company employed some seventy employees. In the mid-1970's, the company's volume of work began to fall and the company lost money in 1977, 1978 and 1979. Oliver continued to lose money in 1980 and by the spring of 1980 the number of employees with the firm had dropped to between fifteen and twenty.

7. In the spring of 1980, Len Oliver retained the services of a business consultant friend of his, Mr. B. Mussen, to advise him as to what should be done with Oliver. Mr. Mussen's advice to Len Oliver was that he simply liquidate the business, advice which presumably was based on the conclusion that Oliver would continue to lose money if it stayed in operation. In testifying before the Board, Len Oliver indicated that he had always hoped that his son John and son-in-law Don Herbison would be able to continue the business of Oliver, but that in the circumstances, and since he felt that the two were lacking in financial and trade knowledge, he concluded that he should take the drastic step of liquidating the business. Mr. Oliver testified that the decision to liquidate the business was made easier by the fact that two "key people" (of whom no details were given) had already left the firm for other jobs.

8. On June 17, 1980, Len Oliver advised Oliver's employees that the company was ceasing operation and that they would all be terminated as of July 1, 1980. Subsequently, Oliver disposed of all of its assets. At the time of the hearing, Oliver still existed as a corporate entity, although it had long ceased to be an active operation. Len Oliver, together with his friend Mr. Mussen, now operate a new non-construction business totally unrelated to the business previously carried on by Oliver. Although Len Oliver's new business rents space from Braneida (at a commercial rate), we are satisfied that this new business is of no relevance to these proceedings.

9. Len Oliver's son John was one of Oliver's employees. John commenced his employment with the company as an apprentice. It is not clear when John Oliver ceased to be an apprentice, but at the time of the hearing he was a journeyman air conditioning and refrigeration mechanic and a qualified gas fitter. There is nothing in the evidence to indicate that prior to Oliver ceasing operations John Oliver had assumed any managerial responsibilities with the firm. Oliver also employed Len Oliver's son-in-law, Mr. Donald Herbison. Mr. Herbison began with the company as an apprentice but switched over to preparing estimates and doing sales work. No evidence was led as to whether or not Mr. Herbison had the authority to decide which jobs should be bid on, or whether he had any other responsibilities with respect to the operation of Oliver.

10. John Oliver testified that when he and Mr. Herbison were advised by Oliver that they were being terminated, the two of them decided to incorporate a business of their own rather than seek employment with another established firm. To this end, in June of 1980 they arranged for the incorporation of Braneida. The name Braneida is short for "Brantford North East Industrial Area", which is part of Brantford in which they leased space for the firm. It should be noted that the building owned by Oliver in which it had its offices was in a different section of Brantford entirely.

11. Braneida acquired its original working capital by way of a bank loan. The loan was personally guaranteed by John Oliver and Donald Herbison and their wives, and also by Len Oliver in his personal capacity. At the time of the hearing the bank was considering a request from Braneida that these personal guarantees be dispensed with.

12. On or about June 20, 1980, Braneida arranged to purchase from Oliver various tools and equipment and certain pieces of office furniture. The total price paid for these items was \$8,063.00 which was apparently a "fair market" figure. Subsequent to this sale, Oliver sold, by auction, the bulk of its equipment, including inventory and two vehicles, for some \$45,000.00. Apparently Oliver later also disposed of its building. In addition to the items purchased from Oliver, Braneida also arranged to lease five of the nine vehicles which had previously been leased by Oliver. Quite apart from these dealings, Braneida purchased some ladders, racks and material from wholesalers and also rented some scaffolding, drills and pipe threading machines. Unfortunately, the value of these items was not put before the Board.

13. When Braneida started up, John Oliver and Donald Herbison circulated letters to some 450 potential customers advising them of the firms existence. The letters indicated that the two men had previously been employed by Oliver.

14. Apart from John Oliver and Mr. Herbison, Braneida began its operations with a number of persons who had previously worked for Oliver, namely, an estimator, a bookkeeper, three refrigeration mechanics, two of whom have now left the company, and a plumber, Doug Oliver, who did service work for Oliver and who now does the same type of work for Braneida.

15. The day to day affairs of Braneida are directed by Mr. Herbison and John Oliver. The firm engages in much the same type of work as did Oliver, although on a smaller scale and doing much smaller jobs.

16. Oliver ceased operations about the first of July, 1980. Braneida started up about

July 14, 1980. It appears that prior to ceasing operations, Oliver finished up all of its work then underway. However, at the time it ceased operations, Oliver had not started work on certain contracts which it had been awarded. These contracts were all subsequently re-let to other firms. Braneida sought to acquire the contract for only one of these jobs, but was unsuccessful, the work being awarded instead to another Brantford-based mechanical firm.

17. Subsequent to Oliver going out of business, additional work had to be done on three of its jobs. Oliver retained Braneida to do this work. One such job involved fixing a leaky toilet while another involved the installation of a meter. For each of these jobs Braneida billed Oliver about \$50.00. The third job involved repair of some air lines improperly installed by Oliver. No evidence was led as to how much Braneida billed Oliver for this work.

18. Braneida has performed work for a number of firms that had not previously used Oliver. Braneida has also performed work for at least two former customers of Oliver. One of these was the Canwirco Company in Simcoe. Oliver had earlier installed some air lines for Canwirco. According to John Oliver, Canwirco planned to have its own employees install some additional lines, but that John Oliver and Mr. Herbison went to Canwirco's premises in Simcoe and convinced Canwirco to assign this additional work to Braneida. The resulting contract, worth approximately \$40,000.00 has been the largest awarded to Braneida.

19. Section 55, subsections (1) and (2) of the Act read as follows:

55.-(1) In this section,

- (a) "business" includes a part of parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

It is to be noted that the term "sale" is defined very broadly, and that the term "business" is not defined at all. As the Board stated in the *Raymond Cote case*, [1968] OLRB Rep. March 1211:

The meaning to be attached to the word "business" depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is "the totality of the undertaking". The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se*

but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business.

20. Because of the nature of the industry, the determination as to whether or not an existing construction "business" has been transferred as opposed to a new one started is always a particularly difficult one to make. In *Tatham Company Limited* [1980] OLRB Rep. March 366, the Board dealt with a situation somewhat analogous to that now before us. When a construction firm, The Tatham Company Limited, went out of business a number of its employees set up a new company, Magnus Engineering and Construction Limited, which in turn purchased much of Tatham's equipment. The Board concluded that there had been a sale of a part of the business of Tatham to Magnus. The facts in the instant case, however, differ in a number of material respects from those in the Tatham case. In particular, whereas Magnus purchased some two-thirds of the equipment of Tatham (with much of the remainder being left to rust) and continued to use both Tatham's office and "yard" facilities, Braneida purchased only some fifteen per cent of Oliver's equipment, and set up business on the other side of town. In a more recent case, *Rivard Mechanical*, [1981] OLRB Rep. May 550, the Board also dealt with the situation of an existing business closing down and another being started up by a number of its former employees. There the prime mover behind the new company was the brother of the owner of the firm that had ceased operations. The Board concluded that there had not been a sale of a business, and in doing so made the comment that the case ought not to turn solely on the family relationship between the two brothers.

21. In the instant case, certain considerations, such as the fact that Braneida's original personnel had all been employees of Oliver and that Braneida purchased much of its tools and equipment from Oliver, do suggest that there might have been a transfer of all or part of Oliver's business to Braneida. However, on balance a number of other considerations, including the difference in name and location of Braneida, and the fact that Oliver disposed of its building and some eighty-five per cent of its tools and equipment to firms other than Oliver, leads us to the conclusion that Braneida is in reality a new business and not the continuation of the business of Oliver. In the result, we are content that while there has been a sale of certain tools and equipment from Oliver to Braneida, there has not been a transfer or sale of the business of Oliver to Braneida within the meaning of section 55 of the Act.

22. Having regard to our determination set out above, and to the fact that Braneida is not bound to the provincial agreement referred to above, it is clear that the grievance referred to the Board cannot succeed, and this referral is hereby dismissed.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I dissent from the majority decision. I am satisfied that all necessary facts have been established by the applicant for the Board to issue a declaration under section 55 of the Act.

2. The evidence establishes that part of Oliver's business was transferred to Braneida and in fact all of Braneida's business was transferred from the Oliver business.

3. In *Raymond Cote*, [1968] OLRB Rep. March 1211 at page 1214, the Board set out the criteria necessary to find that a sale of a business has occurred in the following passage:

“... along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing a profit to assure its success. The total of these things along with certain intangibles such as good will constitute a business.”

In the instant case, whatever managerial know-how and expertise that Braneida needs, they were transferred from the Oliver Company. Donald R. Herbison, son-in-law of Len Oliver the owner of Oliver, was an estimator and in charge of sales for Oliver. John Oliver, son of Len Oliver, was a licensed journeyman mechanic with Oliver, and is quite capable of carrying out the field supervision for Braneida, which he does. They both gained their experience with the Oliver Company and now are partners of the Braneida Company. It is a fact that all the personnel of the Braneida Company came from Oliver, bringing with them the same skills necessary in the operation of the Braneida Company as was the case with Oliver. Len Oliver participated in guaranteeing a loan for Braneida and guaranteed the lease of vehicles from the same leasing company that serviced the Oliver company. Everything Braneida needed to fulfill the obligations undertaken with a hope of producing a profit to assume its success came in whole from Oliver, including good will.

4. John Oliver gave evidence that Doug Oliver, a plumber who was employed by the Oliver Company doing service work, is now doing the same type of work for Braneida. He stated, “there are a good number of satisfied customers in the service end of the business”. In my opinion, when you combine this evidence with the fact that Braneida sent letters out to prospective customers advising them that they were formerly employees of Oliver, I believe that Braneida was acquiring the “good will” of Oliver.

5. For the majority to have considered what percentage of Braneida’s business came from Oliver and thereby use that as a distinguishing factor from *Magnus Engineering and Construction Limited*, as they do in paragraph 20 of their decision, the Board then is taking unto itself a discretionary power that does not exist. A section 55 declaration, contrary to a section 1(4) declaration, operates automatically upon a “sale” or “transfer” or “part” thereof of a business. The Board does not have the discretion to refuse to apply it when the statutory preconditions for its application have been established. When the pre-conditions have been met (as they have, in my opinion, in the instant case), the union retains bargaining rights for employees in a “like unit” to that which existed prior to the “transfer”, and the transferee must apply the collective agreement to the predecessor’s employees in that unit until the Board otherwise declares. However, the Board does have power to *terminate* the collective agreement of the bargaining rights if the successor employer substantially alters the business, to *redefine the unit* if there is an intermingling of the unionized employees, *hold a representation vote* in regard to the bargaining unit if the union represents some of the employees in the new structure but the remainder are either unrepresented, or represented by another union. None of the foregoing situations exist in the instant case.

6. It is my opinion that the majority have overlooked the fact that this application is by the “United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67”, the object of which is to preserve its long-established bargaining rights. Doug Oliver, a plumber, was the only employee in the bargaining unit when the Oliver Company purported to wind up its business and now he is the only plumber in the unit under the Braneida Company, as previously mentioned in paragraph

4 of this dissent. He is doing exactly the same type of work for the successor company as he was doing with the Oliver Company. The Total bargaining unit has been transferred.

7. It is my opinion that "Braneida" is the successor business of "Oliver" and that "Braneida" is bound to the provincial collective agreement with the applicant union.

0943-81-R Marie-Claire Coulombe and Group of Employees of Charterways Transportation Limited, Applicant, v. London & District Service Workers' Union, Local 220, SEIU — AFL — CIO — CLC, Respondent, v. **Charterways Transportation Limited**, Intervener.

Petition — Termination — Whether petition voluntary — Board reviewing principles

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and B. L. Armstrong.

APPEARANCES: *Marie-Claire Coulombe and Orville Crawford for the applicant; Paul D. Middleton for the respondent; no one appearing for the intervener.*

DECISION OF THE BOARD; August 14, 1981

1. The name: "The London and District Service Workers Union Local 220" appearing in the style of cause of this application as the name of the respondent is amended to read: "London & District Service Workers' Union, Local 220, SEIU — AFL — CIO — CLC."

2. This is an application under section 49 of *The Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

3. The Board finds that the respondent is currently the bargaining agent for a bargaining unit comprised of "all employees of [the intervener] at Kitchener, Ontario, employed for not more than twenty-four (24) hours per week and students, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office and clerical staff and dispatchers, and persons covered by a subsisting agreement between Charterways Transportation Limited and Charterways Full-Time Highway Drivers (sic)".

4. The respondent does not contest the timeliness of the application. On the evidence before it, the Board finds the application to be timely and further finds that the applicant is an employee within the bargaining unit set forth above.

5. In support of this application, the applicant filed with the Board a petition purportedly signed by twenty-eight employees in the bargaining unit. The petition was drafted and circulated by the applicant, Marie-Claire Coulombe. Sixteen of the signatures were obtained at the respective homes of the signatories, seven were obtained in the "coffee room" on the intervener's premises, three were obtained in buses which the employees are employed to drive by the intervener and the remaining two were obtained in the employees' cars.

6. No member of management was present when any of the employees signed the petition. Although Mrs. Coulombe did not show the petition to or discuss it with any member of management, John McAra, the intervener's dispatcher, was aware that she was desirous of terminating the respondent's bargaining rights and of forming an employees association to represent the employees. Mr. McAra told Carol Vollmer shortly after she was hired by the intervener as a driver in May of 1981, that "someone was trying to get an employees association back in". (The evidence indicates that the employees of the intervener's predecessor, United Trails, had been represented by an employees association while Ms. Vollmer was employed there approximately five years earlier.) Mr. McAra made it clear to Ms. Vollmer at that time and subsequently that he was opposed to the respondent trade union. However, Ms. Vollmer was not surprised by his attitude. She testified: "He was going on about the union. Typical! No manager wants a union, right?" It was also her evidence that while she feigned interest in what Mr. McAra was saying, she was merely trying to "open the flood gates" to let his words pass by unnoticed.

7. Approximately a month later, Mr. McAra pointed out Mrs. Coulombe to Ms. Vollmer as "the one who is coming in with the association". Mrs. Coulombe, who was unaware of Mr. McAra's remarks, then invited Ms. Vollmer into the coffee room where she (Mrs. Coulombe) explained that she was attempting to have the respondent's bargaining rights terminated so that the employees could form an employees association.

8. Ms. Vollmer told the Board that she "figured" that Mrs. Coulombe and Mr. McAra were "in cahoots". However, she clearly did not feel constrained to sign the petition as a result of that perception since she took no steps to sign the petition at that time or during the following weeks; it was not until July 13, 1981 that Ms. Vollmer signed the petition.

9. Having regard to all of the evidence, the Board is satisfied on the balance of probabilities that Ms. Vollmer voluntarily signed the petition on July 13, 1981. It is evident from her testimony and from her demeanour as a witness that she decided to sign the petition because she wished to be seen by Mrs. Coulombe, and the other employees opposed to the union, as being willing to go along with them in their efforts to terminate the respondent's bargaining rights; she also appears to have been motivated to sign the petition by her (correct) belief that a majority of the employees were willing to sign the petition. However, it appears to the Board that she also wanted to be viewed as a union supporter by the employees who continued to support the respondent; to preserve her "neutrality", she signed a union card on the following day (July 14, 1981).

10. There is no evidence that Mr. McAra spoke to any other employees about the formation of an employees association or the termination of the respondent's bargaining rights. Moreover, it was Mrs. Coulombe's uncontradicted evidence that she and Mr. McAra "don't get along" and that this fact is generally known by other employees. Although a newly hired employee such as Ms. Vollmer might not have been aware of the animosity between Mrs. Coulombe and Mr. McAra, almost all of the signatories of the petition are employees with substantial seniority who would have been aware of that animosity and who, therefore, would not likely have perceived Mrs. Coulombe to be acting in concert with Mr. McAra. Thus, the evidence neither establishes that the hand of management was actively involved in the origination, preparation or circulation of the petition, nor that any employee (with the possible exception of Ms. Vollmer, who we have found was not in fact motivated to sign the petition by her suspicion that Mrs. Coulombe and Mr. McAra were "in cahoots") might

reasonably have suspected the involvement of management and hence been concerned as to whether or not management might become aware of his or her decision to sign it or not to sign it (see *Radio Shack*, [1978] OLRB Rep. Nov. 1943 and *Morgan Adhesives of Canada Ltd.*, [1975] OLRB Rep. Nov. 813).

11. It was submitted on behalf of the respondent that the termination application was "fraudulently" linked with an employees association. However, the evidence does not support that allegation. Although Mrs. Coulombe and some of the other employees apparently intend to take steps in the future to form an employees association with a view to having it certified by the Board as their bargaining agent, the Board is satisfied that it was clear to the employees who signed the petition, including Ms. Vollmer, that the petition was being prepared in support of an application for termination of the respondent's bargaining rights, and that such application would precede any steps which might be taken to form an employees association.

12. Mrs. Coulombe's uncontradicted and credible testimony indicates that she and a number of other employees in the bargaining unit have been opposed to representation by the respondent trade union since April of 1979 when the respondent was certified. Indeed, Mrs. Coulombe circulated a petition in opposition to the respondent at that time. It was her uncontradicted evidence that other employees in the bargaining unit who have been waiting for the arrival of the "open period" under the collective agreement between the respondent and the intervener, encouraged her to launch these proceedings because they are opposed to representation by the respondent trade union and desire to be free to form an employees association of their own.

13. As recently stated by the Board in *Ontario Hospital Association*, [1980] OLRB Rep. Dec. 1759, at paragraph 31 (request for reconsideration dismissed, [1981] OLRB Rep. Mar. 204);

31. The sole issue before the Board in every case regarding a 'petition' is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which opposes the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees' apparent change of hearts. As the Board commented in *N.J. Spivak Limited*, [1977] OLRB Rep. July 462;

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification

before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

See also *Northern Telecom Canada Limited*, [1979] OLRB Rep. April 330."

14. Having regard to all of the evidence and the submissions of the parties, the Board finds that not less than forty-five per cent of the employees of the intervener in the bargaining unit at the time the application was made had voluntarily signified in writing that they no longer wished to be represented by the respondent on August 6, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act* to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 49(3) of the Act.

15. All of the employees affected by this application are employed by the intervener as "school bus" drivers. Due to the seasonal nature of their work, 33 of the 51 employees normally employed in the bargaining unit during the school year were laid off on June 26, 1981, and are not expected to be recalled until September 8, 1981. Under the Board's general "rule of thumb", to be included in the bargaining unit for the purposes of the count, a person who was not at work on the date of the application must generally have been at work at some time during the one month period prior to the application date and have returned to work or been expected to return to work within the one month period following the date of the application (see, for example, *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840 and *Brewers Nursing Home*, [1981] OLRB Rep. July 852. The application of this "one month rule" in the present case results in only 18 employees being included in the bargaining unit for the purposes of the count. However, as the Board explained to the parties who were in attendance at the hearing, it is unnecessary for the Board to decide in the present case whether or not that rule should be applied. The petition, which was signed by 10 of those 18 employees, was also signed by 16 of the other 33 "employees" (for a total of 26 out of the 51 employees normally employed in the bargaining unit during the school year). Thus, a finding that 51 employees were included in the bargaining unit on the date of the application for the purposes of the count, as opposed to merely 18 employees, would not change the fact that the petition was signed by more than forty-five per cent of the employees in the bargaining unit on the date of the application.

16. The parties in attendance at the hearing agreed that if the Board directed that a representation vote be taken in this matter, such vote should be held on or after September 8, 1981 and all persons normally employed in the bargaining unit during the school year should be eligible to vote.

17. For the foregoing reasons, the Board directs that a representation vote be taken of the employees of the intervener in the bargaining unit set forth above. Having regard to the

aforementioned agreement of the applicant and the respondent, those eligible to vote are the (51) employees listed in Schedule B filed by the intervener in this matter, and any new employees hired into the bargaining unit between the date of this application (July 23, 1981) and the date of this decision, who do not voluntarily terminate their employment or who are not discharged for cause between July 23, 1981 and the date the vote is taken.

18. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relation with the intervener.

19. The matter is referred to the Registrar.

2436-80-R Canadian Union of Public Employees, Applicant, v. City of Toronto Non-Profit Housing Corporation, Respondent

Bargaining Unit – Whether full-time cleaning and maintenance staff and resident superintendents engaged in cleaning and maintenance part-time having community of interest – Whether to be included in single unit.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and B. Armstrong.

APPEARANCES: *Ray McAllister and H. O'Regan for the applicant; J. P. Sanderson Q.C., D.V. Forbes-Roberts and C. Masson for the respondent.*

DECISION OF THE BOARD; August 12, 1981

1. The sole issue outstanding in this application for certification is the final composition of the bargaining unit. The application is in relation to cleaning and maintenance staff in the respondent's residential buildings.

2. There are two kinds of persons employed in the maintenance staff. The first are in maintenance crews which work on a regular full-time basis. The second are resident superintendents whose cleaning and maintenance functions are performed on a less structured basis. The respondent takes the position that the resident superintendents should be excluded on the basis that they are part-time employees or on the alternative basis that they have a separate community of interest.

3. As counsel for the respondent conceded at the hearing, the evidence does not support a finding that the resident superintendents are part-time employees in the sense that they regularly work not more than twenty-four hours per week. It appears from the evidence that while they may hold other regular full-time jobs they do regularly work in excess of twenty-four hours per week. The issue therefore becomes whether they nevertheless have a separate community of interest that would justify their exclusion from the bargaining unit.

4. There is little material difference between the resident superintendents and the

employees on the maintenance crews save that the superintendents perform their work with less direct supervision. The skills employed and types of work performed do not give rise to any meaningful distinction between the two groups.

5. In our view it is difficult in principle to distinguish the instant case from the decision of the Board in *Zolty Holdings Limited*, Board File No. 0030-81-R, unreported, June 24, 1981. In that case the Board accepted the position of the employer and found appropriate a single bargaining unit encompassing cleaning staff, including both resident superintendents and full-time cleaners, as well as maintenance employees. We are not persuaded, on the evidence before us, that the full-time cleaning staff employed in crews by the respondent are any more disparate in interest from the resident superintendents than the maintenance crews considered in *Zolty Holdings*. We are satisfied that the respondent's cleaning and maintenance employees can bargain collectively in a single unit and that in the instant case the more comprehensive bargaining unit is the more rational and compelling delineation of employees for the purposes of a Board certificate.

6. The Board therefore finds that all employees of the respondent in the City of Toronto, save and except property manager and persons above the rank of property manager, constitute a unit of employees appropriate for collective bargaining.

7. A certificate will issue accordingly.

2625-80-M United Brotherhood of Carpenters and Joiners of America, Local Union 38, Applicant, v. **Cooper Construction Company Limited**, Respondent.

Health and Safety – Section 112a – Grievor discharged for causing unlawful walkout – Whether grievor acted out of concern for employees' safety – Whether safety simply excuse to disrupt operations – Whether discharge contravening *Occupational Health & Safety Act*

BEFORE: Ian Springate, Vice-Chairman, and Board Members M. J. Fenwick and J. Wilson.

APPEARANCES: *David McKee and Arthur Varty for the applicant; Mark Contini and Paul Hansen for the respondent.*

DECISION OF IAN SPRINGATE, VICE—CHAIRMAN, AND BOARD MEMBER J. WILSON; August 21, 1981

1. The name: "Cooper Construction Co. Ltd." appearing in the style of cause of this application is hereby amended to read: "Cooper Construction company Limited".

2. This is a referral of a grievance to the Board for final and binding determination pursuant to section 112a of *The Labour Relations Act*.

3. This matter arises out of the respondent's discharge of Mr. A. Varty on February 19, 1981. Mr. Varty commenced working for the respondent in November 1980 as a carpenter employed on the construction of a parking garage in St. Catharines. The respondent is bound by the terms of the Carpenters' provincial agreement. In the St. Catharines area the agreement is administered by United Brotherhood of Carpenters and Joiners of America, Local Union 38 ("Local 38"). Mr. Varty is a member of Local 38 and at the time of his discharge was the Local's job steward at the parking garage project. It might also be noted that Mr. Varty has had a long connection with Local 38, and, indeed, until fairly recently was the Local's business agent.

4. On February 24, 1981, Local 38 filed a grievance with the respondent alleging that Mr. Varty had been unjustly dismissed contrary to Article 14.02(2) of the provincial agreement. It appears that the grievance was in fact meant to refer to Article 14.02(a) of the agreement which provides as follows:

The employer acknowledges the right of the Union to elect or appoint stewards and the employer agrees to recognize such stewards. The Union undertakes to keep the employer informed of such appointments in writing. No discrimination shall be shown against a steward for carrying out his duty, but in no case shall his duties interfere with the general progress of the work.

At the hearing, the respondent indicated that having regard to the wording of the grievance it would not contest the right of the union to also rely on Article 22.08 of the provincial agreement which states:

In determining any grievance arising out of discharge or other discipline, the arbitration board may dispose of the claim by affirming the employer's action and dismissing the grievance or by setting aside the disciplinary action involved and restoring the grievor to his former position with or without compensation or in such other manner as may in the opinion of the board be justified.

5. At the hearing, counsel for Local 38 contended that Mr. Varty's discharge was due to his having acted in compliance with *The Occupational Health and Safety Act* or regulations under the Act, or because he had sought to enforce the Act and regulations. If this was in fact the case, then Mr. Varty's discharge would have been in violation of section 24(1) of the Act, which provides, in part, as follows:

No employer or person acting on behalf of an employer shall,

(a) dismiss or threaten to dismiss a worker...

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

6. Having regard to the wording of section 24(2) of *The Occupational Health and Safety Act* it may well be that this Board, acting under section 112a of *The Labour Relations*

Act, has authority not only to apply the provisions of the provincial agreement set out above, but also to deal with the alleged violation of section 24(1) of *The Occupational Health and Safety Act*. In the instant proceedings, however, this issue need not be finally decided. If Mr. Varty was in fact discharged because he had been acting in compliance with *The Occupational Health and Safety Act*, or seeking the enforcement of the Act or its regulations, just cause would not have existed for his discharge, and accordingly we would in any event exercise our discretion under Article 22.08 of the provincial agreement and direct his reinstatement with compensation.

7. Before reviewing the events leading up to Mr. Varty's discharge, we would note that we found Mr. Varty to be a highly unsatisfactory witness. His answers to many questions were extremely vague and off topic, and at times he exhibited what can only be described as a highly selective memory. On a number of occasions Mr. Varty contradicted his own previous testimony, and much of his testimony on key issues ran directly counter to the testimony of other witnesses who we found to be highly credible. In these circumstances, we have accepted the evidence of other witnesses wherever it has conflicted with that of Mr. Varty.

8. On January 8, 1981 all of the carpenters working on the parking garage site stayed in the carpenters' construction shack for some additional fifteen minutes after the end of the lunch period. Very little direct evidence was led with respect to this work stoppage, and because of the lack of evidence we decline to make any specific finding as to what caused the men to overstay their lunch break. Further, the evidence falls far short of establishing that Mr. Varty had any responsibility for what occurred. However, whatever the true state of affairs, it is clear that both Mr. Paul Hansen, the respondent's job superintendent, and Mr. B. Wunovic, Local 38's current business agent, were of the view that Mr. Varty had been behind the fifteen minute work stoppage and that the stoppage had been aimed at pressuring the respondent into altering a work assignment with respect to the stripping of formwork. In consequence of this, Mr. Hansen advised Mr. Varty that he would not accept this type of conduct on the job, and Mr. Wunovic told Mr. Varty that under no circumstances were the carpenters on the project to stop work over a work assignment.

9. On January 27, 1981, all of the carpenters on the job stopped work at 1:30 p.m. and did not return to work. Mr. Varty testified that on the day in question it was snowing, and he noticed that three men working on "beam bottoms" were sliding because it was slippery underfoot, and that out of a concern for their safety he called them off the job into the carpenters' shack. Once in the shack, according to Mr. Varty, he noticed that all the other carpenters had followed them in. Mr. Varty testified that the men then held a "safety meeting" during which he advised them that they were working under unsafe conditions due to a lack of sand to prevent sliding, and the fact that pieces of lumber with nails in them were being left on the ground and once covered with snow might go unnoticed. Mr. Varty stated that during the meeting there was also a brief discussion concerning a disputed work assignment.

10. Mr. Varty's testimony as to the events of January 27th did not accurately reflect what we are satisfied actually occurred that day. Rather, Mr. Adolph Polap, the respondent's carpentry foreman, came across a carpenter passing up four-by-four pieces of wood to another carpenter standing on a scaffold. Mr. Polap immediately assigned a labourer to pass up the four-by-fours and sent the carpenter who had been doing this work to also work on the scaffold. Shortly thereafter, Mr. Varty approached Mr. Polap and said that the passing up of four-by-fours was carpenters' work, and that if it was not reassigned to carpenters Mr. Varty

would call the men off the job and call it a safety meeting. At this time Mr. Varty also suggested that certain areas be sanded. Mr. Polap in turn indicated that he would discuss Mr. Varty's concerns with Mr. Hansen. Shortly after this, Mr. Varty called all of the carpenters off the job into the carpenters' shack. Although Mr. Varty stated that he called only the three carpenters working on the beam bottoms into the shack, we are satisfied he called in all the carpenters, including those working in areas which Mr. Varty did not claim to be unsafe.

11. At one point that afternoon, Mr. Hansen went into the carpenters' shack to try to get the men back to work. Mr. Varty told Mr. Hansen that if the job of passing up the four-by-fours was reassigned to carpenters the men would go back to work.

12. During the hearing Mr. Varty sought to paint the respondent as being uncaring and not at all concerned with job safety. We are satisfied, however, that the respondent was safety conscious and at all times open to suggestions to improve the safety of the work site. Indeed, during the afternoon of January 27th, Mr. Hansen indicated to Mr. Varty that if he had any concerns about safety he should raise them with himself. While the carpenters were in the shack, the respondent assigned a number of labourers to spread sand over the work areas. This action on the part of the respondent, however, did not result in the carpenters going back to work. In cross-examination, Mr. Varty was asked why he had not called a safety inspector, and his response was that the company had put down sand. Asked why he did not tell the men to return to work after the sand had been put down, Mr. Varty's response was that he did not keep them in the shack. Asked why he himself did not go back to work, his reply was simply "because no one else did".

13. On the morning of January 28, 1981, it was snowing lightly. The respondent's practice on days when it was snowing was to allow the carpenters to take a vote among themselves to see if they wanted to work, with the respondent accepting the results of the vote. Starting time on the job was 8:00 a.m., and at 8:00 Mr. Polap asked Mr. Varty if the carpenters were prepared to work. Mr. Varty replied that he would have to analyze the weather reports. The carpenters did not start to work, even though no vote had been taken among them to determine whether or not a majority wanted to work. It might be noted that at 8:00 all of the trades other than the carpenters on the respondent's job site started to work, as did the carpenters on other projects in the area. There was no change in the weather conditions between 8:00 and 9:00 a.m. However, at about 9:00 Mr. Varty advised Mr. Hansen that the men were now prepared to work. Mr. Hansen, upset at what had occurred, however, responded by sending all of the carpenters home.

14. On February 18, 1981 Mr. Hansen noticed that two carpenters were hooking a wooden panel, which had been used as part of a form, onto a crane. There had earlier been an understanding reached between the respondent and the business agents representing both the carpenters and the construction labourers on site that although carpenters would release the forms, hooking panels to a crane would be done by labourers. Accordingly, Mr. Hansen assigned two labourers to do this type of work. About forty-five minutes later, Mr. Donald Gordon, the respondent's project engineer, heard Mr. Varty making the comment that the job was running too smoothly, that it looked as if Paul Hansen is trying to "stir up shit" and that it looked like Mr. Varty was going to have to "stir up some more shit too". The normal quitting time on the project was 4:30, with the men actually stopping work and packing up their tools at 4:25. Commencing at 4:10 p.m., Mr. Varty was seen going around talking to each of the carpenters on the site, and as he finished talking to each carpenter, that individual would stop

work and pack up his tools. Mr. Varty was actually overheard telling one of the carpenters involved to pack up his tools. On this evidence, we are led to the conclusion that Mr. Varty told all of the carpenters to pack up their tools early.

15. On February 19, 1981 it was raining, and the respondent decided only to assign men to work in covered areas. At about 8:15 a total of six men, four carpenters and two labourers, were assigned to release some forms in a fairly large area under a poured slab of concrete which was enclosed by tarpaulins. At the time the men were assigned to work in the area, there were a number of propane gas heaters being used to heat the concrete. The area, however, was ventilated by a window, and by the flaps of two tarpaulins being tied back. The respondent often assigned men to work in this type of situation in the winter, and the only complaints it had ever previously received concerned the heat in the enclosed area, particularly since the men were wearing winter clothing. Shortly after the men started work in the enclosed area on February 19th, one of the carpenters complained about the heat to Mr. Polap. This resulted in the heaters being turned off. It should be noted that none of the employees working in the area complained about a gaseous smell. Further, at about 8:00, when the propane heaters were still on, Mr. Varty and Mr. Polap held a conversation within the area in question. During this conversation, Mr. Varty made no mention of the area possibly being unsafe. The evidence of all witnesses other than Mr. Varty was that on the day in question only a slight odor of propane could be detected in the area.

16. At about 8:40 a.m., Mr. Varty approached Mr. Polap and advised him that he had telephoned Mr. Sylvester, the area manager of the Ministry of Labour's Occupational Health and Safety Branch, and advised him that he was concerned with the safety of the air in the enclosed area and that he wanted a test taken. According to Mr. Varty, Mr. Sylvester told him that he would be sending a safety inspector to the site, and that Mr. Varty should advise management to take the employees out of the area in question until the inspector arrived. Although we do not know what Mr. Varty actually said to Mr. Sylvester, the safety inspector later went to the site with the incorrect understanding that Mr. Varty had himself been working in the enclosed area. Mr. Polap's reaction to Mr. Varty's comments was that Mr. Varty should himself take the men out of the enclosed area. Mr. Polap indicated that he said this in disgust because of his feeling that Mr. Varty's actions had not in fact been motivated by any true safety concerns. Mr. Varty, however, declined to call the men out of the enclosed area, and accordingly, Mr. Polap did so.

17. In justifying his actions, Mr. Varty testified that some three or four weeks previously he had been working in an area similarly enclosed and had experienced a sore throat, a headache and nausea. Further, said Mr. Varty, he had also noted that another carpenter had been off work for two days after working in a similar situation, and from this he had concluded that there was likely a problem with this type of work situation. It should be noted that Mr. Varty did not raise his concerns with Mr. T. Taylor, the employee health and safety representative on the job or with the respondent until the day in question, and even then not until after he had already phoned Mr. Sylvester.

18. A safety inspector, Mr. D. Brown, arrived at the job site shortly prior to 10:00 a.m. and inspected the area in question. Mr. Brown subsequently set out his reactions in a report which stated as follows:

A complaint was received by Mr. Geo. Sylvester from Mr. Art Vartey,

shop steward, about a potentially hazardous condition on the above project. Mr. Vartey complained about fumes from the propane heater making him dizzy. The area that he was working in is quite large — 300' x 50' x 8'- app. — and is protected by tarpaulins on the open sides. There is a circular opening in the wall approx. 5'0" in diameter about 20'0" from where he was working and in two areas the tarpaulins are tied back leaving a 3'0" to 4'0" opening. There is provision for more tie backs where required. The heater in question is quite some distance away; about 200'0". Upon my arrival I walked into and climbed up the ladder where the workman had been. The air was stale and there was a slight smell that could be recognized as from the propane heater. The carpenter foreman and the health and safety representative told me that the condition now is the same as it was earlier prior to the complaint being received. It should be noted here that the shop steward bypassed the foreman and the health and safety rep. They were made aware of the complaint after Mr. Varty had called my office.

It would be very foolish for any workman to stay in an enclosed area that he suspects may have toxic fumes. If the level in this area was dangerous and I don't believe it was, the simple remedy would have been to lift a couple of the tarpaulins. Mention was made of taking a reading for toxic fumes in the area and I feel that this was not required.

19. Shortly after 10:00, Mr. Brown met with Mr. Hansen, Mr. Taylor, the employee health and safety representative, and Mr. Varty. Earlier that day, the respondent had indicated to the carpenters that the work day would end at 10:00 due to a shortage of covered-in work, and as it happened Mr. Varty was called into the meeting just as he was about to leave the job site with two other carpenters. The meeting began with Mr. Brown indicating that he felt Mr. Varty had not followed the proper procedure in dealing with the situation. Mr. Varty then replied that he was on his own time and was leaving, which he did. In giving his testimony, Mr. Varty stated that he left the meeting with the safety inspector only because the other carpenters were waiting for him. Later the same day, Mr. Hansen telephoned Mr. Varty at his home and advised him that he was being discharged.

20. We are satisfied that Mr. Varty's conduct prior to February 19th was highly improper. Any challenges Mr. Varty had to the respondent's work assignments should have been dealt with either under the terms of the provincial agreement or the jurisdictional dispute provisions of *The Labour Relations Act*. Any concerns about health or safety should have been raised with either the respondent or the health and safety representative on the job. In fact, however, the evidence leads us to the conclusion that in his conduct prior to February 19th, Mr. Varty was not motivated by any health or safety considerations, but that rather he used a claim about being concerned with health and safety as a cover for his actions. This was made clear by Mr. Varty's conduct on January 27th when he called the carpenters off the job allegedly for safety reasons, and then indicated to management that the men would return to work if the respondent altered one of its work assignments, and also later when after the respondent had corrected the one alleged safety problem he had raised with Mr. Polap, Mr. Varty did not try to get the men to go back to work.

21. As already indicated, at the hearing counsel for Local 38 contended that Mr. Varty's

discharge had been contrary to section 24(1) of *The Occupational Health and Safety Act* in that he had been discharged for acting in compliance with the Act or seeking the enforcement of the Act or its regulations. Counsel never did specify how he thought Mr. Varty had been acting in compliance with the Act or seeking its enforcement. However, presumably counsel was taking the position that by his call to the Occupational Health and Safety Branch, Mr. Varty was seeking the enforcement of section 13 of the Act, which requires that a construction employer protect the health and safety of employees, as well as of section 106 of the construction projects regulation under the Act which provides that a fuel-fired heating device is to be used only when there is provision for adequate ventilation. We are satisfied that if Mr. Varty did feel a real concern for the safety of the men working in the enclosed area, he should have first raised the matter with either management or the health and safety representative on the job prior to taking any other action. However, for the purpose of these proceedings we are prepared to assume that if Mr. Varty had truly been concerned that the other employees were working in a potentially unsafe situation, and that his call to the Occupational Health and Safety Branch had been made in good faith, then no proper cause would have existed for him to be disciplined.

22. In light of the importance of health and safety matters, one should be extremely reluctant to conclude that an employee who claims to have been acting out of health and safety concerns was in fact motivated by other considerations. Any serious doubts about the truth of the matter should be resolved in favour of the employee. In the instant case, however, we are fully satisfied that Mr. Varty's conduct was not motivated by any health and safety considerations, but rather by a desire to continue to disrupt the respondent's job project, and that the method he chose to do so was by raising a false health and safety issue.

23. We have not reached our determination on this matter lightly, but are compelled to the result by a number of considerations. Firstly, there is the fact that on January 27, 1981 Mr. Varty caused a work stoppage allegedly for safety reasons but in reality in an attempt to pressure the respondent into changing a work assignment. Accordingly, it is clear that Mr. Varty had no compunctions about raising a claim of a health and safety concern when no such concern existed. Further, Mr. Varty had been engaged in a pattern of conduct aimed at disrupting the job site. On the day prior to his call to the Health and Safety Branch, Mr. Varty indicated he was going to "stir up some more shit". Mr. Varty indicated that he was concerned about fumes in the enclosed area, and yet he himself had been in the area on the day in question talking to Mr. Polap and had not raised any such concerns. Mr. Varty had been advised by Mr. Hansen that any safety concerns should be raised with him, and yet the alleged problem with the enclosed area was never raised with him. The evidence establishes that there was only a trace of propane smell in the air at the relevant time and no employee working there had any complaints. When Mr. Varty telephoned the Health and Safety Branch the propane heaters had already been turned off. However, even assuming Mr. Varty had been unaware that they had been turned off, if he had been truly concerned about gas fumes, he could simply have asked that the heaters be turned off, or for additional tarpaulins to be pulled back to provide greater ventilation. When all these considerations are taken into account, we can reach no other conclusion but that Mr. Varty's conduct was motivated by a desire to disrupt the job site and that his false claim of a health and safety problem was merely the device he used to achieve this result.

24. Mr. Varty's action on February 19, 1981 resulted in the men not working in the enclosed area that day. We feel that not only must Mr. Varty have reasonably foreseen that

this would be the result of his actions but that this was in fact the result he desired to attain. Mr. Varty's invoking of a knowingly false health and safety claim was abusive and improper, and clearly justified the imposition of a serious disciplinary penalty. The fact that Mr. Varty was a steward does not change this situation. The respondent did not discriminate against Mr. Varty because he was carrying out his duties as a steward, but rather it disciplined him because he was an employee who had engaged in improper conduct. Accordingly, the respondent did not violate Article 14.02(b) of the collective agreement. Similarly, the respondent did not violate section 24(1) of *The Occupational Health and Safety Act*. Further, there is nothing in Mr. Varty's short work record with the respondent, punctured as it was with his active involvement in causing a number of unlawful work stoppages, which would cause us to exercise our discretion under Article 22.08 of the agreement to mitigate the penalty of discharge imposed on him by the respondent.

25. The grievance is accordingly dismissed.

DECISION OF BOARD MEMBER M. J. FENWICK;

1. I dissent. I am not persuaded that the grievor, Arthur Varty, is the villain the employer witnesses made him out to be. Nor do I agree with my colleagues that Varty's testimony be disregarded.

2. Varty was union shop steward on the job site. As such, he took various initiatives which he considered would assure him and his workmates of a healthy and safe working environment.

3. On the other hand, management persons, knowing that Varty had been a union business agent and shop steward, took a defensive posture whenever he referred to safety problems. The foreman, Adolph Polap, accused Varty of "making political hay". Whether or not this was reference to internal local union politics was not clarified by the foreman. In any case, it was clear that management persons felt Varty was a disturbing influence on the job.

4. Varty's workmate, Philip Bukator, testified that on an earlier occasion the air was very "gassy". He said he felt ill and as a result did not appear at work the next day.

5. It would appear that there was a lack of communication between Barney Wunovic, the union's business agent, and Varty in respect to job site problems. As an example, Varty and another witness testified that they were unaware that Terry Taylor was the safety representative on the job.

6. The record shows that Varty was never specifically warned about his conduct on the job or that management felt his duties of steward were interfering with the progress of the job.

7. If adequate warning were given and Varty chose to ignore it then management would be justified in terminating his employment. In the absence of such warning the discharge, in my opinion, was not justified. I would have reinstated Varty to his job without loss of pay or benefits.

0019-81-M The Corporation of the City of Thunder Bay, Applicant, v. Canadian Union of Public Employees, Local 87, Respondent.

Employee – Whether senior clerks exercising managerial functions – Section 95(2) – Board summarizing its approach to managerial exclusions and “changes doctrine”

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

DECISION OF THE BOARD; August 31, 1981

1. This is an application under section 95(2) of *The Labour Relations Act* in which the applicant has raised a question concerning the “employee status” of Ruth Frost and Isabelle Koopmans, presently classified as “senior homes clerks”. The applicant contends that these individuals are managerial personnel who must be excluded from the bargaining unit and collective agreement in which they have been included for some years. Since the application was made during the currency of the collective agreement between the parties, and when that agreement was signed, the disputed individuals were clearly treated by the employer as “employees”, the Board appointed an officer to inquire into the changes in their duties and responsibilities since the agreement was concluded. This inquiry, of course, necessarily encompassed their existing duties as well. The relevant provision of *The Labour Relations Act* reads as follows:

- 1.-(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,
 - (a) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

The parties are agreed that Isabelle Koopmans’ evidence is representative of both disputed individuals.

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor that its members will have “divided loyalties”. This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby* [1974] 1 CLRB at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm’s length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enter-

prise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve counter-vailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management — on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for “cause” or passed over for promotion on the grounds of their “ability”. The employer does not want management’s identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm’s length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

3. *The Labour Relations Act* does not contain a definition of the term “managerial function”, nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called “first line” managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote,

grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar — service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by

section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining — especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall Case* above referred to, titles alone are not much assistance in determining what a person's functions really are . . .

The cases cited above would seem to indicate that while a person may have minor supervisory function or very limited confidential function in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b).

6. It should always be remembered, however, that *The Labour Relations Act* is intended to extend collective bargaining rights to employees, and it is incumbent upon any party seeking to exclude employees from the scheme of the Act, to come forward with affirmative evidence that they exercise managerial functions. (See: *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283 at paragraph 11; and *Bakery and Confectionery Workers International Union v. Salmi*, 56 DLR (2d) 193.) Furthermore, (and in addition to the usual rule that "he who asserts must prove"), a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position. The Board in *Windsor Transit*, [1979] OLRB Rep. Mar. 262 put it this way:

Counsel argued that the respondent had included the disputed classifications in the bargaining unit for more than 15 years, and should be estopped from now claiming that these employees are managerial. There is considerable merit in this argument. Where, over an extended period of time, an employee has been included in a bargaining unit and has not been treated as "managerial", there is a natural inference that he has not been exercising managerial functions and is, therefore, an "employee" within the meaning of the Act. An evidentiary onus rests upon any party who seeks to establish the contrary. Generally, the Board will require evidence of a change in duties and responsibilities before the Board will alter the previously agreed upon status quo. At the same time, the Board recognizes that section 95 relief is not restricted to situations in which parties are negotiating their first collective agreement. Organizations and systems of management can change. Over time the degree and focus of decision-making power can be altered.

Nevertheless, if a person has been included in a bargaining unit for some years, there has not been a significant alteration of his duties and responsibilities, and there is little concrete evidence of the kind of "mischief" to which section 1(3)(b) is directed, it is unlikely that this Board will conclude that the individual exercises managerial functions and must now be excluded from the unit. An employer's organizational scheme has a historical dimension which must be considered when the evidence is being weighed.

7. We can summarize these general approaches then, as follows:

- (1) A party seeking to exclude an individual from the ambit of a remedial statute designed to extend benefits to employees, must be prepared to demonstrate that the disputed individual is not an employee.

- (2) A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect.
- (3) In the case of a party seeking to alter the *Status quo* during the currency of a collective agreement, it will ordinarily be necessary to demonstrate a significant change in duties and responsibilities since the agreement was concluded, so that it is clear that the perception of employee status shared by the parties when the agreement was signed, has now become obsolete.
- (4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the "traditional foreman", so that he is no longer the king-pin he once was. This process has several effects — all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with "real" managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status — especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.
- (5) The acceptance of the "effective recommendation test" mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it is necessary to show that his recommendations are *really* effective, so that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide *concrete examples* of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years,

this evidence has either not been available at all, or when examined closely, amounts to no more than a "participatory decision-making style". Whatever value the latter may have in improving employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards.

8. With this background then, we return to the case at hand. The facts are not especially complicated. Since the disputed individual has been regarded as an employee by both parties for some years, the task of the Board is to weigh the evidence against the background of the employer's established organizational scheme, and to determine whether, in its opinion the subject individuals now exercise managerial functions within the meaning of section 1(3)(b) of the Act.

9. Ms. Koopmans has worked for the applicant for 18 years and has been senior clerk for 4 years. She reports to Fran Tamblin the office co-ordinator. There are six other persons in the office area in which Ms. Koopmans works; but she wasn't sure whether it could be said that she supervised them. She performs some co-ordinating functions, and, as senior clerk gives some instruction; but, for the most part she does her own job, and the other clerks do theirs. Her job functions have not changed in recent years and throughout this entire period she has been a member of the bargaining unit without apparent difficulty. Problems of any consequence are referred to Fran Tamblin. Ms. Koopmans has never been told she could discipline anyone and has never in fact done so. She might speak to an employee occasionally, as any other senior employee might, but anything of consequence is handled by Tamblin. Minor amounts of time off may be granted but only in accordance with established guidelines and as "lieu time" to compensate for overtime worked. Her input in the hiring process is consultative only, and as we have already mentioned, she has never had occasion to discipline anyone or participate in the grievance procedure. She does not attend management meetings where employee relations are discussed; has not done employee evaluations recently (which in any event are considered and acted upon, or not, by others) and in the last four years has only had to go to Tamblin *once* with an employee problem. When the evidence is examined in its totality it is evident that there is no basis whatsoever for concluding that Ms. Koopmans exercises managerial functions.

10. In the opinion of the Board, neither Ms. Koopmans, nor, having regard to the agreement of the parties, Ms. Frost exercises managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*.

0430-81-R United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIL-CLC, Applicant, v. **Custom Leather Products Limited**, Respondent, v. Group of Employees, Objectors.

Build – up – Evidence of projected increases in work force – Whether Board postponing holding of representation vote – Conditions precedent for application of build – up principle reviewed

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and B. Armstrong.

APPEARANCES: *Stephen Krashinsky and Reginald Duguay for the applicant; W. M. Kenny and George Chuchman for the respondent; Nancy Marshall, Linda Parker and Dawn Waddell for the objectors.*

DECISION OF THE BOARD; August 17, 1981

1. The name “Custom Leather Products” appearing in the style of cause of this application as the name of the respondent is amended to read: “Custom Leather Products Limited”.
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent employed at its plants in the cities of Kitchener and Waterloo, Ontario, save and except foremen (foreladies), persons above the rank of foreman and forelady, associate development manager, quality control department, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on June 10, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. The group of employees who were objectors to this application were all employees of the quality control department. Since that department is excluded from the bargaining unit, it was unnecessary for the Board to determine whether it should give any weight to the statement filed insofar as the membership evidence is concerned.
7. Notwithstanding the fact that the applicant has established that more than fifty-five per-cent of the employees of the respondent at the material times were its members, the respondent contends tht the Board should exercise its discretion under section 7(2) of the Act

to direct that a representative vote be held at a future date because of a planned build-up in its work force.

8. The Board has long recognized the significance of a build-up in an employer's work force to the representation rights of the employees of the employer. See the Board's decision in *Emil Frant*, 57 CLLC ¶18,057. A much more recent decision of the Board in *F. Lepper & Son Ltd.*, [1977] OLRB Rep. Dec. 846 reviewed the rationale of the Board's practice of postponing the final resolution of an application for certification where the employer has a plan for an imminent build-up in its work force and went on to review as well the criteria which the Board had applied in build-up situations since the *Emil Frant* decision, *supra*. The *Lepper* decision, *supra*, explains the Board's rationale in the following terms;

In deciding whether to postpone the taking of the representation vote because of the respondent's planned build-up of its work force, the Board must balance the rights of the 28 employees already employed at the time of the application with the rights of future employees the respondent intends to hire over the next eight months. By delaying the vote, the existing employees are temporarily deprived of their opportunity to engage in collective bargaining. By ordering an immediate vote, however, the future employees would be deprived of their opportunity to participate in the selection of their own bargaining agent.

The decision then sets out the criteria which the Board has applied in attempting to balance the representation interests of the employees who were already employed at the time the application was made and those of the employees who are yet to be engaged. These are:

Over the years the Board has developed some guideposts to assist it in the balancing of the rights of these two groups of employees. *Firstly*, the Board requires that there be a real likelihood that a build-up will take place; there must be a firm plan for an imminent build-up. (See *Power Controls* [1967] OLRB Rep. Mar. 954, *Cameron Packing Inc.* [1972] OLRB Rep. Nov. 988, and *Canron* [1967] OLRB Rep. Sept. 750.) As well, the actualization of the build-up must be relatively certain. It should not, in other words, be dependent on market factors well beyond the control of the employer. In *Travelaire Trailer Mfg. Ltd.*, [1970] OLRB Rep. Nov. 829, for example, the Board ruled that the planned build-up was not sufficiently firm to delay the vote because the build-up was almost totally dependent on the unstable market conditions in which the respondent's industry was engaged. The Board made a similar ruling in *Cameron Packaging Inc.*, (*supra*), where the projected build-up was dependent on the next year's market and competitive conditions. *Secondly*, the planned build-up must take place within a reasonable period of time. While each case must be decided on its own facts, we note that in *Vulcan Equipment*, [1974] OLRB Rep. May 285, a build-up over a period of seven months was allowed; in *United Asbestos*, [1974] OLRB Rep. April 234, a build-up over a period of some sixteen months was allowed. In *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637, on the other hand, a build-up spanning between one and five years was not allowed. *Thirdly*, to determine whether the existing group is sufficiently

representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If less than fifty per cent of the expected total are then employed, it is normally felt that the group is not sufficiently representative and that the application is therefore premature. (See *B. F. Goodrich Canada Limited*, [1970] OLRB Rep. Sept. 655; *Cornwall Spinners*, [1975] OLRB Rep. Sept. 693) *Fourthly*, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application. (See *Ford Motor Co.*, [1967] OLRB Rep. Dec. 858, *Cornwall Spinners*, (*supra*) and *Sparton Tool & Mould Ltd.*, [1975] OLRB Rep. June 469.)

9. The respondent employed 242 employees as of May 27, 1981, the date of application. There is no doubt from the evidence before the Board that the respondent has firm plans for an immediate build-up which would occur between that date and September 30th, 1981. The respondent's plans include as well a continuing build-up through to June 1981. The manning levels after the application date resulting from the respondent's projections are summarized as follows:

Date Hiring to be completed	Total number of Employees
September 30, 1981	346
October 31, 1981	376
January 31, 1982	406
June 30, 1982	696

10. The respondent manufactures leather goods for the retail trade and for automotive original equipment manufacturers. The automotive products are the ones which are the source of the projected build-up. Its present automotive customers are Ford and General Motors, with General Motors being the larger and the source of the additional business which is the cause of the build-up. The automotive products have only been a significant factor in the respondent's business during the eighteen months preceding this application when it began to produce leather steering wheel wraps. At the time of the application, the respondent had on hand purchase orders from General Motors for steering wheel wraps for its 1982 model year automobiles. This business accounts for the increase from 242 employees at the application date to 346 employees at the end of September 1981. The respondent's hiring program was already underway when this application came on for hearing.

11. The projected increases in the work force after that date are not covered by purchase orders but arise from bids from the respondent which have been accepted by General Motors for the supply of additional automotive parts for the 1983 model year. The nature of the automotive business is such that quotations for the supply of parts are made well in advance of the model year for which they are required. In the respondent's case, it quotes directly to General Motors with sufficient lead time so that General Motors can quote in turn to its various product divisions. When the respondent is advised by General Motors that its bid on a product has been accepted, the respondent considers that to be a firm business commitment, but not a final one until the purchase order is released. Purchase orders are usually released

approximately three months before the date when the supply of parts is scheduled to begin. The purchase order is not issued until the following steps have been completed:

- (a) General Motors releases the final design and blueprints for the parts;
- (b) the respondent completes its production engineering; and
- (c) General Motors issues a tooling order and the employer completes tooling for the new product (General Motors pays for the new tooling).

The bids accepted by General Motors may be divided into two groups and account for the remaining increase of 350 employees after September 30, 1981. One group is responsible for 150 and the other accounts for 200.

12. The first group is comprised of the supply of steering wheel wraps, knobs for gear shifts and brake handles, and horn caps, all for the 1983 model year. The numbers of parts to be supplied has been stipulated by General Motors and was the basis for the respondent's bids on that business. This group is responsible for the projected increase of 60 employees between September 30, 1981 and January 31, 1982 and a further 90 employees by June 30, 1982. The respondent's plant capacity is sufficient to handle this new business with the addition of a second shift. It is expected that hiring of the 90 employees will start in March 1982 and be completed by the end of June.

13. The second group involves the supply of a new vinyl roof for cars using a manufacturing process for which the respondent has Canadian manufacturing rights. The respondent has worked for some three and a half years with General Motors on the design and development of the roof and last year supplied General Motors with 3,000 parts on a trial run. Preparations for a final trial run in August 1981 were underway at the time of the hearing and, if successful, the respondent expected to have a purchase order in September or October. Together the respondent and General Motors have invested \$400,000.00 in development and trial production. General Motors has specified this roof for its 1983 model year cars and will require 250,000 units for that purpose. The respondent has arranged for an additional \$5,000,000.00 of bank credit to supply working capital for its projected new business and \$1.2 million of this has been earmarked for working capital for the vinyl roof. Production of the new roof accounts for 200 of the projected increase in employees, with hiring forecast to begin in March of 1982 and be completed by June 30, 1982. The respondent will require additional plant facilities in order to accommodate the vinyl roof production. Its intention is to locate either in Kitchener or Waterloo, therefore within the geographic scope of the bargaining unit described above and suitable facilities have been identified. The respondent will not make a final decision on where to locate until the purchase order has been received from General Motors. The final location will depend on what facilities are available when the purchase order is received.

14. The criteria referred to in *Lepper, supra*, which have been used by the Board to guide it in balancing the competing interests of present and future employees indicate what conditions must be met before the Board will defer determining the right of the present employees to be represented in collective bargaining. These conditions can be summarized as follows:

- (a) the present employees are not representative of the work force to be employed by the end of the build-up period;
- (b) the planned build-up is scheduled to take place within a reasonable time span; and
- (c) there is a reasonable certainty that the build-up plan and schedule can be achieved.

Each criterion does not stand alone, it must be taken into account together with the others. Generally, each case must be decided on its own facts. Usually the Board considers that there is a representative work force at the time of the application when it is fifty per cent of the projected total employment and that the employees are engaged in a representative number of the classifications required to do the bargaining unit work which will exist at the end of the build-up period. Many of the Board's reported cases indicated that a build-up period of up to six or seven months is acceptable. It would appear that the longest build-up period in a reported decision would be sixteen months in the *United Asbestos* decision, *supra*. In assessing the degree of certainty that the build-up plan and schedule will be met, as indicated by the cases cited in *Lepper, supra*, the plan should not depend upon factors which are beyond the control of the employer, such as future market conditions. The Board's decision in *Valdi Inc.*, [1979] OLRB Rep. June 593 suggests that where the build-up is dependent on such uncertain conditions as marketing objectives, there needs to be evidence from which the Board can infer a real likelihood of the build-up being realized, such as "... an overt commitment of capital and/or assumption of legal obligations ...".

15. When those criteria are applied to the facts of this case, there is no doubt that the employer has a firm plan for build-up with a real likelihood of it being realized by the end of September 1981. Since, however, the employees at work at the time of the application are representative of the skills which will be required when the build-up is completed, including the projected build-up to June 30th, 1982, and they represent more than fifty per cent of the numbers expected to be employed as at September 30th, 1981, this part of the build-up plan standing alone is not sufficient cause for the Board to defer certification of the applicant.

16. It remains to be seen, therefore, whether the other segments of the build-up plan satisfy the conditions set out above. If the Board accepts the respondent's entire build-up plan, it is quite evident that the number of employees at work at the time the application was made would not be representative of the 696 employees that the respondent expects to employ by June 30th, 1982. The same can be said were the Board to accept that the part of the build-up plan after September 30th, 1981 which is based on the second group of "accepted bids" which would result in a total of 546 employees. If the Board accepted the first group and rejected the second, there would be 496 employees by June 30th, 1982 and, in absolute terms, the present employees would not be representative of that group also.

17. The scheduled build-up spans a total period of thirteen months from the date of application to June 30th, 1982. Standing alone, this falls within the time frame which the Board has previously found to be reasonable as indicated by the cases referred to above. It is, however, near the upper limits of that time frame and twice as long a period as most of the cases the Board has dealt with. This suggests to the Board that there is particular need to view the time factor in relation to the other factors. For example, the longer the time period within

which the plan is to be realized, the greater the opportunity for it to be put away by a host of influences. In this case, for example, that part of the plan which depends on the 1983 model year might be disrupted if the market for 1983 General Motors cars went soft.

18. The actualization of the build-up plan is dependent entirely on the business for which General Motors has accepted the respondent's bids. The Board readily acknowledges that this is a more substantial base for a build-up plan than would be the case if it was based simply on a marketing forecast developed from the respondent's estimates of market growth and its expectations of what its share of the market would be. For one thing, the manning levels of this build-up plan are based on quantities which the customer has told the respondent it will order from the respondent if it makes the expected quantity of 1983 model year cars. Nonetheless, an accepted bid is not as certain as a purchase order and General Motors could cancel the business, if any need arose with relatively little or no risk of legal liability compared with business covered by a purchase order. In fact, the highest status that can reasonably be given to the bids accepted by General Motors is to characterize the customer's commitment to the respondent as, "if we build the cars, you will get the parts business on which your bids have been accepted". The facts in this case offer some indication that the respondent itself does not consider an accepted bid to be a binding business undertaking since it is not prepared to commit a major expenditure to make sure that it will have the plant capacity in either Kitchener or Waterloo for the manufacture of the vinyl roof until it has a purchase order for that business from its customer. Whether that is the only reason or just one of several valid business reasons for the respondent's hesitancy, the question of whether in fact the respondent is able to locate vinyl roof production within the geographic scope of the bargaining unit will not be settled until after it receives the purchase order. Therefore, the Board cannot be certain that this segment of the build-up will affect the bargaining unit described above. Moreover, there is the uncertainty as to the realization of the build-up plan and schedule created by the absence of a firm order for the vinyl roof, the fact that the order depends on a final, successful trial run and the thirteen months time span involved. The Board considers these uncertainties, taken together, to be sufficient grounds to cause it not to give any weight to this part of the respondent's build-up plan in deciding whether to defer the determination of the applicant's bargaining rights.

19. We are left, therefore, with that segment of the build-up plan which relates to the first group of accepted bids. It would bring total employment up to 496 employees by June 30th, 1981. The 242 employees present when the application was filed are forty-nine per cent of that total and, therefore, are at the very threshold of being numerically representative of the total. This segment of the build-up plan contains a measure of uncertainty as to its potential realization because, like the vinyl roof segment, it is unsupported by binding purchase orders and is scheduled to take place over a thirteen months period during which unforeseen factors could disrupt its realization. In the Board's view, since the employees already at work when this application was made are so nearly representative of the ultimate work force and since there is a measure of uncertainty about whether the build-up plan and schedule will be realized, it would not be a proper balancing of the interests of the present employees and the future ones to delay certifying the applicant.

20. For all of the foregoing reasons, the Board is not prepared to consider any of the respondent's build-up as being relevant to this application.

21. A certificate will issue to the applicant.

0722-81-R Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C., Applicant, v. **Extendicare Diagnostic Services** Division of Extendicare Limited, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Practice and Procedure – Employer objecting to practice of Board permitting union to review employee list where disagreement exists – Whether giving union unfair advantage – Whether management may be present during review by union – Board confirming existing practice

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members M. J. Fenwick and L. Hemsworth.

APPEARANCES: *H. Goldblatt, Joe Aggimenti, Ron Davidson and Jeff Keshen for the applicant; M. Rhienlander, D. Jeffrey, D. J. McKillop, Q. C. and James Baldwin for the respondent; Sandra MacLennan for the objectors.*

DECISION OF THE BOARD; August 17, 1981

1. The name "Extendicare Limited Laboratory Centres" appearing in the style of cause of this application as the name of the respondent is amended to read: "Extendicare Diagnostic Services Division of Extendicare Limited."
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
4. Having regard to the agreement of the parties the Board further finds that all employees of the respondent in Metropolitan Toronto save and except supervisors, person above the rank of supervisor, office and clerical employees and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. An issue arose at the hearing with respect to the union's access to the employee lists filed by the respondent. In every certification proceeding the respondent employer is required to file a list of the names of all the employees falling within the bargaining unit proposed by the trade union as of the date of application, and specimen signatures from each person whose name appears on the list. The Board uses the list and the specimen signatures to determine the number of union membership cards signed by persons in the bargaining unit and to determine the percentage of employees in the bargaining unit who are members of the trade union as of the date of application. The Board is required to make these determinations under section 7 of the Act.
6. The union is not shown the employee lists submitted by the employer prior to the hearing. However, after the Board has ascertained the disagreement, if any, with respect to the description of the appropriate bargaining unit the union is given an opportunity to challenge the accuracy of the employee list before the Board makes a determination as to the number of employees in the bargaining unit and the extent of union membership support within the bargaining unit. It is open to the union to challenge a name shown on the list as:

- not an employee as of the date of application (i.e. was never employed or left employment prior to the date of application).
- not an employee who is within the bargaining unit.

The practice of the Board is to have a Labour Relations Officer sit with the union while the list is reviewed and challenges identified. A Labour Relations Officer then meets with both parties and attempts to resolve the differences between them. If agreement is not possible, the Board will usually appoint a Labour Relations Officer to conduct a formal inquiry, which may require an examination of company records and the calling of evidence, and to report to the Board.

7. Counsel for the respondent in this matter objected to the union being given an opportunity to review the employee list submitted by it. Counsel for the respondent argues that if the union is given the opportunity to study the names of the employees falling within the bargaining unit it can use this information to assist it in conducting a fresh organizing campaign if unsuccessful in the instant application. Counsel for the respondent argues that many of the employees whose names appear on the list may wish to remain anonymous and that the list should be treated in the same manner as signed membership evidence or a signed petition. At the very least, the respondent argues, employees whose names are going to be revealed should be served with notice of this possibility by the Board. Counsel for the respondent suggests that any investigation required to check the accuracy of the employee list submitted by the respondent be undertaken by a Labour Relations Officer.

8. In every application for certification brought before it, the Board is required under the statute to ascertain the extent of union support within the bargaining unit. The Board's determination in this regard, which is made on the basis of the list of employee names and specimen signatures filed by the respondent employer, directly affects the legal rights of the trade union under the Act. In these circumstances, and given the often negative reaction of employers to unionization, it would be an unusual administrative practice for the Board to deny the union access to the employee list. In the absence of any direction in the statute to protect the names of those in the bargaining unit, as there is with respect to employee choice, and in the face of the requirements of natural justice the Board is under an obligation to provide the applicant union with access to the information upon which it is about to make a determination affecting its legal rights.

9. Even if the Board could deny access, there is no practical alternative. It has been suggested that the Board officer make the inquiry where the list is challenged. If the union is denied access there can be no specificity to the challenge. The Board officer would be required to investigate every name in every application where there is a challenge; an undertaking which would strain the resources of the Board. More fundamentally, however, the Board officer, in contrast to union supporters, has no firsthand knowledge of who was or was not an employee as of the date of application or who is or is not in any given classification. The Board officer is unable to make the objective assessments required to satisfy the Board as to the accuracy of the employee lists.

10. The persons whose names appear on the list are, or should be, persons working within the bargaining unit. Their names are known to their fellow workers including fellow workers who are union supporters. In these circumstances the respondent's submissions with

respect to the need to preserve the anonymity of these persons is without merit as is the submission that these persons be served with individual notice. The notice of hearing which is posted in the workplace in every application for certification is sufficient.

11. Signed membership cards and signed petitions or statements of desire evidence employee choice with respect to membership in or opposition to a trade union. A list of the names of the employees who fall within the bargaining unit does not evidence employee choice and, therefore, is not subject to the statutory direction contained in section 100(1) of the Act to maintain the secrecy of employee choice. Indeed, as is noted, it is essential to the processing of any application for certification that the union be given the opportunity to review the employee list.

12. In the unlikely event an application is filed with the Board for the purpose of obtaining the employee list in order to assist with future organizing, the Board can find an abuse of process and respond accordingly. This is not such a case. In any event, it is the current Board practice to have a Board officer sit with the union during the review of the list and ensure that the list is not utilized in any way unrelated to the case at hand.

13. In response to the ruling of the Board that the union was to be given access to the employee list, counsel for the respondent asked to be allowed to be present during the review of the list by the union. Counsel for the union took strong objection.

14. The Board ruled at the hearing that the union was entitled to review the list without representatives of management present. The Board hereby affirms its oral ruling in this regard. Section 100(1) of the Act provides:

The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

Because of the nature of the inquiry and the need for counsel for the union to converse with his employee advisors the Board is of the view that the presence of a management representative could jeopardize the secrecy of union membership and impinge upon the privacy of the solicitor client relationship. In the absence of a credible reason for allowing management to be present during the union's examination of the list the Board ruled that the examination could be made without a representative of management present.

15. The union examined the employee list and registered 19 challenges. The parties resolved one of these with the result that the status of 18 of the 81 persons who are shown on the list of employees prepared by the employer as falling within the bargaining unit is at issue.

16. Having regard to the foregoing, the Board hereby appoints a Board Officer to meet with the parties and inquire into whether or not the following persons shown on Schedule A are employees of the respondent who fall within the bargaining unit:

M. Cardoso
 J. Garces
 C. Martyres
 C. Matheson
 C. Rosello
 J. Verwey
 M. Welsh

The officer is directed to further inquire as to whether or not the following employees shown on Schedule B are employees of the respondent who fall within the bargaining unit:

V. Kumar
 A. Vagners
 B. Murgatroyd
 W. Gay
 M. Kalushner
 A. Watts
 M. Wrong

The officer is further directed to inquire into the duties and responsibilities of D. Jacobs and K. Tozman who the applicant claims are office and clerical employees.

The officer is further directed to inquire into the duties and responsibilities of A. Gokool and A. Morris who the applicant claims exercise managerial authority within the meaning of section 1(3)(b) of the Act.

17. Subsequent to the hearing in this matter the union advised the Board that it is prepared to forego its possible entitlement to certification without a vote. The Board is satisfied that whatever its ultimate determination with respect to the status of those who have been challenged, with respect to the status of those who have been challenged, not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 9, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. The best that the objectors could achieve in the circumstances of this case is a vote. Having regard to all of the foregoing a representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote. Those whose status has been challenged are eligible to vote. However, the ballots cast by these persons will be segregated pending a final determination as to their status.

19. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent. The returning officer is directed to count those ballots which have not been segregated and to announce the results of the count to the parties.

20. The matter is referred to the Registrar.

0571-81-M Local 18 United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Hussey Seating Company (Canada) Limited**, Respondent.

Collective Agreement – Section 112a – Collective agreement signed by employee on behalf of employer – Whether having actual, apparent or ostensible authority to bind employer – Whether employer ratified agreement by subsequent actions

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members C. A. Ballentine and E. J. Brady.

***APPEARANCES:** David M. McKee and Tom Fenwick for the applicant; G. Grossman and Nicholas Demy for the respondent.*

DECISION OF THE BOARD; August 25, 1981

1. This is a complaint filed under section 112a of *The Labour Relations Act* by Local 18 United Brotherhood of Carpenters and Joiners of America in which the applicant alleges that the respondent is in breach of the subsisting provincial agreement. The complainant relies on a “short form” agreement purportedly entered into by the respondent company and the United Brotherhood of Carpenters Local 1946 in 1975 in support of its claim that the respondent is now bound by the current provincial agreement under the provisions of section 132 of the Act. The “short form” agreement submitted in evidence before the Board was signed by a Dave Frankson on behalf of the company and is for a five year term with an automatic renewal from year to year thereafter should neither party seek to renegotiate. The respondent takes the position that Mr. Frankson did not have the authority to enter into a collective agreement on behalf of the company and denies, as well therefore, that it is bound by the current provincial agreement.

The relevant parts of section 132 are as follows:

132.(1) Subject to subsection 2, any collective agreement in operation upon the coming into force of this section in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause (e) of section 106 and represented by affiliated bargaining agents is enforceable by and binding on the parties thereto only for the remainder of the term of operation of the agreement, regardless of any provision respecting its renewal.

(2) Notwithstanding subsection 1 of section 44, every collective agreement in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause (e) of section 106 and represented by affiliated bargaining agents entered into after the 1st day of January, 1977 and before the 30th day of April, 1978 shall be deemed to expire not later than the 30th day of April, 1978, regardless of any provision respecting its term of operation or renewal.

(3) Where any collective agreement mentioned in subsection 1 ceases

to operate, the affiliated bargaining agent, the employer and the employees for whom the affiliated bargaining agent holds bargaining rights shall be bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and the employer bargaining agency representing the employer.

3. The facts in this matter are relatively straightforward. The company is engaged in the business of installing bleacher seating. The company was retained to perform work in connection with the construction of a sports complex at the University of Western Ontario in January, 1975. Mr. Dave Frankson, one of four installers working for the company, was assigned to the job. He was being paid \$4 per hour at the time. An installer is placed in charge of the physical erection of the bleacher seating on each job but maintains telephone contact with the company's assistant general manager located in Toronto. Mr. N. Demy occupies the position of assistant general manager and vice president operations as he did at the time of the University of Western Ontario job. He visited the site at the time the components were being unloaded and returned again during the latter part of the installation. It is his evidence that the work is not difficult in that the wood and metal components are pre cut to specification and need only be assembled and bolted together. Mr. Frankson had commenced work with the company only a few months before the University of Western Ontario job and had had no prior experience in this type of work so that a more experienced installer was assigned to assist from time to time. Where additional manpower is required it is the responsibility of the installer assigned to the job (Mr. Frankson in this case) to make the necessary arrangements. In most cases this involves a telephone call to the local office of Canada Manpower. Mr. Frankson was responsible for signing and issuing pay cheques to those hired locally. The company had paid those hired locally by cash but instituted a chequing system in January, 1975. Under this system the installer was required to maintain records and issue cheques drawn on a casual petty cash account established by the company.

4. Mr. Frankson left the employ of the respondent company in April 30, 1975; at about the time the University of Western Ontario job was being completed. The company advised the Board that it is unaware of his current whereabouts and therefore, was unable to arrange for his attendance at the hearing in this matter.

5. Mr. Fred Culver, the business representative of Local 1946 since 1973 testified that he received a call from Mr. Frankson on January 21, 1975 inquiring about the assignment of men to the University of Western Ontario job. It is Mr. Culver's evidence that Mr. Frankson identified himself as the superintendent of the job and when asked if he had the authority to sign a collective agreement with the union replied in the affirmative. Mr. Culver visited the job site and observed that Mr. Frankson was the only person there and that he was not working "with the tools". Mr. Frankson signed the "short form" agreement referred to earlier on behalf of the company. Mr. Culver testified that he forwarded two signed copies to the company's head office the next day. He produced a copy of a letter addressed to "Hussey Seating Co., 20 Torlake Road, Toronto" dated January 23, 1975 enclosing "two signed and witnessed short form collective agreements for your files and reference." Mr. Demy testified that a search of the company's files did not turn up the letter. He denied ever seeing the letter. The union did not receive a reply.

6. A member of the Carpenters' Union Local 1946 was assigned to the job commencing January 23, 1975 and at least one or two Carpenters' members worked on the job until the end

of February, 1975. The job was completed sometime in late May, 1975. These men were paid a rate of \$7.95 per hour as required under the purported collective agreement. It is not disputed that these men would have been supervised by Mr. Frankson.

7. Mr. Demy testified that Mr. Frankson, as an installer, did not have authority to sign a collective agreement on behalf of the company. He acknowledged, however, that he (Mr. Demy) would have knowledge of the fact that certain local employees were being paid \$7.95 per hour (at a time when labourers referred by Manpower could be employed for \$3 per hour). He testified that Mr. Frankson would have checked with him and he would have given the OK to pay this rate to the carpenters assigned from Local 1946. Mr. Demy was asked if Mr. Frankson was in charge of the job and replied that he would have been to the extent of making sure that the work was progressing but that he would have been expected to call Mr. Demy in the event of delays or any other unusual happenings.

8. In the period from the completion of the University of Western Ontario job to the present the company has worked on four projects within the London area. The company worked at the Alymer Police College in November, 1975 and employed two members of the Carpenters' Local 1946. The company also performed work at Cleardale Public School and Westmount Public School in London in 1975 and at the Glendale High School in Tillsonburg, Ontario in October, 1976. These were relatively small jobs each with a gross billing value of less than \$1,704. In contrast, the University of Western Ontario job had a gross billing in excess of \$30,000. Union members were not used in connection with these jobs and grievances were not filed. Local 1946 denied knowledge of these jobs. The Company performed a number of other jobs (29) in the period January, 1975 to the present in the "counties of Elgin, Middlesex, Perth, Huron, Grey, Bruce, Oxford, Lambton, Kent and Essex" — within the scope of the purported short form collective agreement. Union members were not used in connection with any of these 29 jobs and grievances were not filed by the union in respect of any of these jobs.

9. The union identifies the two issues which must be dealt with as firstly whether the document filed with the Board is a binding collective agreement and secondly, if it is, whether it can be found that the collective bargaining rights established under the agreement have been abandoned. The union argues that on the undisputed evidence of Mr. Culver the Board must find that Mr. Frankson said he had the authority to sign a collective agreement. It is the union's position that this fact, considered in conjunction with the position occupied by Mr. Frankson on the job site, must cause the Board to conclude that the agreement which he signed is a collective agreement which binds the company. In support of its contention that Mr. Frankson had the apparent authority to bind the company, the union relies on the fact that Mr. Frankson was the senior company person on the job, that he was responsible for hiring the labour required for the job, supervising the work of those hired and paying those hired. The union argues further that when reference is made to the failure of any senior company official to reply or respond to Mr. Culver's letter enclosing a copy of the signed agreement or to take issue with the wage rates being paid, the company is now estopped from denying the existence of the collective agreement. Given the small size of the projects carried out by the company in the London area following the University of Western Ontario job, the union argues that nothing can be made of its failure to grieve the company's use of non-union labour. In the face of the automatic renewal of the agreement and the lack of company activity which could reasonably have altered it to the need to make contact, the union argues that it cannot be found that it has abandoned its bargaining rights. Rather, the union asks the Board to find that the company entered into a collective agreement with Local 1946 and that under the provisions of section 132(2) it is now bound by the provincial agreement.

10. The company argues that Mr. Frankson who was at best a working foreman responsible to Mr. Demy, did not have the authority to sign a collective agreement on behalf of the company. The company argues that no express or ostensible agency was created in that Mr. Demy as a principal of the company, by his acts or representations did not lead the union to believe that Mr. Frankson had the authority to bind the company to a collective agreement. It is the company's position that it would be very unusual indeed for someone in Mr. Frankson's position to have such authority. The company argues further that in the absence of any change in its operating practices following the time when the union claims it became bound to the purported collective agreement, as in *re Vic Starchuk* [1980] OLRB Rep. Apr. 516, the Board should not make the finding that the company was aware of what Mr. Frankson had done or in any way accepted what he had done. The company asks the Board to accept the evidence of Mr. Demy that there is nothing in the company records to suggest the existence of such an agreement. The company maintains that because the agreement extends to work performed in the Windsor area the union cannot take the position that the agreement is abandoned outside London. The union must take the agreement as a whole and in light of its failure to respond to the company's disregard for the purported agreement it cannot argue that the company bound itself to the agreement. Furthermore, the company argues that the Board must find that the union did not consider itself party to a binding collective agreement with the company or alternatively, that it abandoned its bargaining rights. The company, citing *Traders Finance Corporation* [1967] 2 O.R. 112, argues that the onus is on the union to establish the ostensible authority of Mr. Frankson to bind the company to a collective agreement. The company argues that the union has failed in this regard and asks the Board to find that it is not bound by the current provincial agreement or alternatively that if a collective agreement was entered into in 1975 that the union subsequently abandoned its bargaining rights.

11. We deal firstly with the question of whether Mr. Frankson had the actual authority to bind the company to a collective agreement. We accept the evidence of Mr. Demy that Mr. Frankson was not given express authority in this regard. Mr. Frankson, who was classified and paid as an installer, had no management responsibility except to hire local help, and to supervise and pay the persons so hired. His express authority was circumscribed and did not extend to recognizing trade unions and signing collective agreements on behalf of the company. Furthermore, the Board is unable to find on the evidence before it that Mr. Frankson was impliedly given such authority. In the absence of any evidence to suggest that in the construction industry on-site supervisors and managers, who are not principals of a company, are normally clothed with such authority, we are unable to find that the assignment of Mr. Frankson to "supervise" the University of Western Ontario job implicitly constituted the granting of such authority. Given the nature of the legal rights and obligations which flow from the signing of a collective agreement, the lack of evidence in this regard is not surprising. Indeed, it is to be noted that Mr. Culver (as with the union representatives in the reported case on point) did not accept, without first inquiring, that Mr. Frankson, whom he considered to be the job superintendent, had the authority to sign a collective agreement. It is our finding that Mr. Frankson did not have the actual authority to recognize the union or sign a collective agreement on behalf of the company.

12. This is not to say that a job superintendent or other on-site representative who lacks actual authority cannot bind the company. The on-site representative is in a position analogous to an agent of the company. If apparent or ostensible authority can be proven, or if apparent or ostensible authority cannot be proven but the principal, through his subsequent conduct,

ratifies the prior action of his on-site representative, the company is bound by his undertakings.

13. The doctrine of apparent or express authority has been analyzed in *Freeman and Lockyer v. Buckhurst Park Properties (Magna Ltd.)* [1964] 2 Q.B. 480 (C.A.), the leading case on the subject. In that case a group of four formed a limited company in order to purchase an estate with the intention of reselling it for development. While the four had the power to appoint a managing director, they never did so. Nevertheless, one of the four assumed the duties of a managing director with the knowledge and approval of the others. Without express approval of the others the same person hired a firm of architects and surveyors to prepare an application for planning. The company refused to pay the architects' fees on the grounds that the "agent" had no authority to enter such a contract. In his reasons for finding that the company was bound by the contract, Diplock, L.J. defined apparent or ostensible authority, in contrast to actual authority as:

a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

Diplock, L. J. cautioned:

... that where the agent upon whose "apparent" authority the contractor relies has no "actual" authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.

Four conditions which must be fulfilled in order to allow a contractor to enforce a contract entered into on behalf of the company by an agent who has no actual authority to bind the company are set down. These are:

- (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
- (2) that such representation was made by a person who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

- (3) that the (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
- (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

In the recent case of *Rockland Industries Inc. v. Amerada Minerals Corporation* (1980) 31 N.R. 393, the Supreme Court of Canada referred to Diplock's reasons in *Freeman and Lockyer, supra*, with the approval in accepting his interpretation of the doctrine of apparent authority.

14. This Board has dealt with the apparent or ostensible authority of an on-site representative to bind his employer to a collective agreement in three cases (see *Vic Starchuk & Associates Inc., supra*, *Collegiate Sports Ltd.*, [1977] OLRB Rep. August 487 and *Inspiration Ltd.*, [1967] OLRB Rep. Sept. 562). In *Inspiration Ltd., supra*, the earliest of the three cases, the Board described the issue before it as determining whether or not the company's on-site supervisor had the apparent authority to sign a collective agreement on behalf of the respondent company. The Board went on to state that:

“this (whether the representative had apparent authority) in turn is dependent on two factors, namely, whether David held himself out as having such authority, and whether Ouellette reasonably believed that he had such authority.”

This test was applied by the Board in both *Collegiate Sports Limited, supra*, and *Vic Starchuk, supra*. In the *Inspiration* case, *supra*, the Board found that the on-site representative was the only member of management on the job from its commencement to the time that the agreement was signed, that this representative was responsible for hiring and that he made a representations to the union that he had authority to sign an agreement on behalf of the company. In these circumstances the Board found that both aspects of the test had been satisfied. In *Collegiate Sports Limited* the Board found that it was not reasonable for the union to conclude that the on-site employee with whom contact had been made had the authority to sign a collective agreement on behalf of the company. In the *Vic Starchuk and Associates Inc.* decision, *supra*, the Board came to the opposite conclusion. However, in that case the respondent company made the proper remittances to the union trust funds and to the appropriate association and altered its practice with respect to obtaining carpenters after the purported collective agreement had been entered into. The Board stated that there is “evidence of a significant change in the respondent's conduct dating from Brohman's signing of the collective agreement”. In our view the *Vic Starchuk* decision is based on conduct by the respondent which ratified the prior action of the on-site representative. As we have stated, even if ostensible authority cannot be established the subsequent conduct of the principal may nevertheless serve to ratify the agreement and create an estoppel.

15. The test used by the Board in its reported decisions requires the union seeking to rely on a collective agreement signed by a job supervisor to establish that it was reasonable for it to believe that the on-site employee who signed the agreement on behalf of the company had the authority to do so. In the absence of convincing evidence to establish that it is normal practice

in the construction industry for a job supervisor to be clothed with the authority to recognize a trade union and enter into a collective agreement on behalf of a company, we do not accept that it is reasonable for a union to rely solely on the representations of the job supervisor. It follows that if the union is to establish that it was reasonable to believe that the company's on-site representative had the authority to sign a collective agreement it must establish the ostensible or apparent authority of the individual. The union must establish that representations, either by word or by conduct, to the effect that the company's on-site supervisor has the authority to sign a collective agreement, were made to it by an owner of the company or by a person with actual authority to manage the business of the company either generally or in respect of labour relations. It is these representations which, at one and the same time, make it reasonable for the union to conclude that the job supervisor has the necessary authority, and estop the company from later denying the existence of this authority.

16. In this case there were no such representations made by the principals or senior managers of Hussey Seating. Mr. Culver, the union representative, relied on the representation of Mr. Frankson who, although an installer, had clearly defined and limited responsibilities in the area of hiring, paying and supervising workers hired locally to assist with the erection of the bleacher seating. He did not have the authority to bind the company to a collective agreement. Mr. Culver did not seek out the principals of Hussey Seating or any of its senior managers but instead relied upon the representations of Mr. Frankson. In these circumstances we are unable to find that Mr. Frankson had the apparent or ostensible authority to bind the company to a collective agreement.

17. The issue that remains to be determined is whether the company by its actions following the signing of the purported collective agreement, ratified the actions of Mr. Frankson in signing the document on its behalf. The fact that the company paid the wage rate stipulated in the agreement does not, in and of itself, establish that the company considered itself bound by the collective agreement. It is not uncommon in the construction industry for a company to pay union rates without entering into a collective agreement. (See *Ecodyne Limited*, [1979] OLRB Rep. July 629 at para. 28.) There is no evidence in this case, in contrast to the *Vic Starchuk* case, that the company made remittances to union health and welfare funds in accord with the agreement or altered its hiring practices to conform with the agreement as would suggest that it considered itself bound by the agreement. Although the company performed a large number of jobs within the geographic scope of the union's purported recognition, with the exception of the small Alymer Police College job, it did not in any way alter its method of operation to conform to the purported collective agreement. The union seeks to rely on the letter which Mr. Culver testified was sent to the company enclosing two signed copies of the agreement, and the failure of the company to respond. Mr. Demy testified that he never received the letter and could not find a copy of it in the company files. If it could be established that the company received signed copies of the collective agreement and took no action to repudiate the document, a tacit ratification could be inferred. The onus, however, is upon the union to establish that the agreements were received. It was open to the union to forward the documents by registered mail, to hand deliver them or to follow up with a phone call or other direct contact with the company when no reply was received. The union did none of these things. We have no reason to discount the testimony of Mr. Demy and accordingly, we must find that the union has failed to establish that the company even received the letter upon which it relies. There is insufficient evidence before the Board to support the conclusion that the company by its conduct ratified the purported agreement signed by Mr. Frankson on its behalf.

18. Having regard to all of the foregoing, we have not been satisfied that Mr. Frankson had apparent or ostensible authority to bind the company to a collective agreement. Furthermore, we have not been satisfied that the company ratified the agreement signed by Mr. Frankson by its conduct following his signing of the agreement. Accordingly, we hereby find that the company is not bound by the purported collective agreement put in evidence by the complainant union, nor is it bound by the provisions of the current provincial agreement. This grievance is hereby dismissed.

0379-81-U Isobel Northover, Linda Tower, et al., Complainants,
v. American Federation of Grain Millers, Local 242, **Inter-Bake
Foods Ltd.**, and American Federation of Grain Millers, Respondents

Duty of Fair Representation – Ratification Vote – Section 79 – Union president causing confusion as to date of vote – Whether employees denied opportunity to vote – Whether breach of section 60

BEFORE: George W. Adams, Chairman, and Board Members J. A. Ronson and B. Armstrong.

APPEARANCES: *Eva E. Marszfwski for the complainants; Rodney D. Dale, Beatrice Ennis, Agnus Dorman, Doris Backus and Barb DeGaut for the respondent trade union; Tim Sargeant and Peter Radley for the respondent company; and Robert W. Willis and Larry D. McCombs for the American Federation of Grain Millers.*

DECISION OF THE BOARD; August 27, 1981

1. This a complaint under section 79 of *The Labour Relations Act*. The complaint is amended to add as respondent the American Federation of Grain Millers (hereinafter referred to as “the International”). The complainants, a group of employees of Inter-Bake Foods Ltd. and members of both the International and its Local 242, allege violations of section 63(5) and section 60 of the Act. These sections provide:

63.-(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

(4a) All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(5) Any vote mentioned in subsection 4 shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

60. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The employees contest the manner in which a ratification vote meeting was called and conducted. The meeting was called on Thursday, April 23, 1981 for Sunday, April 26, 1981. The employees complain:

- (1) the meeting was called upon insufficient notice;
- (ii) the notice was not provided to all full-time and seasonal employees;
- (iii) the meeting was improperly and unconstitutionally called; and
- (iv) the meeting was not properly conducted.

3. The relief requested includes:

- 1. A declaration that:
The ratification vote taken by those present at the meeting on Sunday, April 26th, 1981, is invalid.
- 2. An order prohibiting the Trade Union and the Employer from recognizing and signing the new collective agreement based upon the vote held on April 26th, 1981.
- 3. An order requiring the Union to conduct the vote to ratify the proposed collective agreement in such a manner that those entitled to vote have ample opportunity to cast their ballots, and specifically:
 - (i) That a full-time and seasonal employees receive at least two weeks written notice of the meeting at which the ratification vote is to be conducted.
 - (ii) That the notices sent out to the employees in sub. (i) above are to contain a copy of either the amendments to the collective agreement, or a copy of the new collective agreement which is to be ratified at the meeting.
 - (iii) That the Union allow the membership present and attending at the ratification meeting to have an ample opportunity to discuss the proposed amendments.
 - (iv) That the ratification vote be made by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

4. Organizing and other costs of the Complainant-Grievors herein.

4. Negotiations between the union and the company for a new collective agreement affecting approximately 600 employees, commenced some time in January of 1981 and continued through the winter of 1981. In total, there were approximately ten meetings held in an effort to arrive at a new collective agreement and six of these meetings were held prior to the conciliation meeting held on March 16, 1981. The negotiations were conducted on behalf of the local union by Mr. Robert Willis, Executive Vice-President of the International Federation of Grain Millers. Mr. Willis travelled from his office in Minneapolis for the purpose of conducting the negotiations on behalf of the local union. A no-board report dated April 10, 1981 was filed which would have put the union in a legal strike position on Monday, April 27th, 1981. A special union membership meeting was held on Sunday, March 29th, 1981 for the purpose of conducting a vote to give the negotiating committee authority to call a strike. The March 29th meeting was presided over by Mr. Larry McCombs, District Vice-President of the American Federation of Grain Millers. Larry McCombs and certain members of the American Federation of Grain Millers, Local 242, maintain that at the March 29th meeting, Larry McCombs told the membership that there would be a contract ratification vote conducted on Sunday, April 26th, 1981. In support of that assertion is the Conciliation Meeting of March 16, 1981 when it was agreed by the parties to create a strike deadline against which bargaining could develop momentum. Willis had indicated to Mediator, John Hopper, that the union needed the pressure of a no-board report. Mr. Byers for the company and Mrs. Ennis, President of Local 242 were present when these arrangements were devised. However it appears that Mrs. Ennis was confused about the arrangement and no arrangements were made at that time to secure a hall in which to hold a meeting on Sunday, April 26th.

5. The local union holds general membership meetings on the 3rd Tuesday of every month. On Tuesday, April 21st, 1981, at a general membership meeting, the President of Local 242, Mrs. Beatrice Ennis, was specifically asked whether there would be a meeting held on Sunday, April 26th for the purpose of holding a contract ratification vote. Revealing her lack of understanding of the arrangements between the parties made on March 16, 1981 she replied that she thought the membership would not be in a legal strike position until Wednesday, April 29th, and therefore, she felt it was unlikely that there would be a contract ratification vote meeting held until Sunday, May 3rd. However, the very question indicates that at least some employees had heard of the possibility of a ratification vote being held on Sunday, April 26, 1981.

6. As agreed March 16, 1981, the negotiation meetings scheduled for Thursday, April 23rd and Friday, April 24th, 1981 commenced at the Howard Johnson's Motor Inn in London. Mr. John Hopper from the Ministry of Labour was present to assist the union and the company in their efforts to arrive at a new agreement. Mr. Willis testified that he first learned of the confusion over the strike deadline and proposed ratification meeting when he met with Mrs. Ennis on Thursday. He believed that the whole no-board arrangement and the two days of meetings would be wasted without the deadline. A judgment was therefore made to proceed with the negotiations and immediately notify the membership of the proposed April 26, 1981 meeting. At approximately noon on Thursday, April 23rd, Mrs. Agnes Doorman, the Treasurer of Local 242, telephoned certain union members at the plant for the purpose of instructing them to post notices for the purpose of informing the general membership of a contract ratification vote meeting to be held on Sunday, April 26th. At least one large, unsigned notice was posted and arrangements were made to secure a location for the

meeting. The negotiations continued from 9:30 in the morning on Thursday, April 23rd until 6:30 in the morning on Friday, April 24th at which time a tentative agreement was reached that the union negotiating committee undertook to recommend to the membership. The contract ratification vote meeting was held on Sunday, April 26th and presided over by Mr. Robert Willis. At that time he explained the terms of the proposed collective agreement to the membership who were present. Mr. Willis informed the membership that if they did not accept the contract, that they would be "hitting the bricks" the next day. There were 390 members in attendance. The vote was conducted by secret ballot and the result was 212 members in favour of the contract and 178 opposed to the contract. Somewhat fewer employees turned out at the meeting when the preceding collective agreement had been ratified and the outcome of that vote was not dissimilar. The evidence reveals that usually a week's notice was given of earlier ratification meetings; that only one microphone was available at the meeting in question; and that no handout summarizing the agreement was prepared. There is also some uncertainty over whether or not union stewards performed the usual role of notifying employees on layoff or sick leave of the meeting. However, no complaint was registered with respect to any of these matters at the meeting.

7. On Monday, April 27th, 1981, there were at least two petitions circulated by unhappy members of the union complaining for a variety of reasons that the contract ratification vote meeting was unfairly conducted. These petitions were signed by a substantial number of union employees. The negotiating committee was concerned about the reaction of a significant number of their members to the way in which the vote had been conducted. As a result of consulting with their solicitor, the negotiating committee was advised to refrain from signing the collective agreement in order to allow any employees who felt they had been unfairly treated to apply to the Ontario Labour Relations Board for a ruling. A special union membership meeting was held on Sunday, May 10th for the purpose of advising the general membership that the union would maintain a neutral position in these proceedings.

8. A number of employees testified that the ratification meeting seemed hurried. The meeting lasted from 11:00 a.m. to 12:30 p.m. No one was refused an opportunity to question the speakers and the terms of the proposed agreement were fully explained. As noted, no member questioned the conduct of the meeting or moved to have the meeting declared as irregular and set aside. There is no notice requirement in the constitution or bylaws of either union and no provision in these documents appears to have been contravened. However, it is more than likely that a number of employees made arrangements to go away during the weekend on the strength of Mrs. Ennis' incorrect assurances during the union meeting of April 21, 1981. Indeed, Mrs. Isabel Northover was one such employee. Mrs. Northover testified that she saw the notice on Thursday, April 24, 1981 but, because it was not signed, did not know it was official until the next day. Unfortunately, she had made arrangements on the Wednesday to be away and chose not to cancel those plans. Mrs. Northover is a union steward and told the Board that because of the lack of notice and her own plans, she did not have time to telephone all the people in her department. However, her daughter and son work for the company and she asked her daughter to call other employees if she had time. The Board was not advised as to how many employees were actually contacted or needed to be contacted. Another employee, Mrs. Suta, testified that Mrs. Ennis had assured her on Wednesday, April 27, 1981 that there would be no ratification vote that coming Sunday and she was unable to attend the meeting because of a commitment to the Ladies ride for Cancer held on the same date. A Mrs. Jeffrey expressed similar concerns. She did not think the employees would ever go on strike but would have preferred to see more meetings because of her belief that a company "always holds something back."

9. Mr. Willis has negotiated the previous three collective agreements for the union. He testified that during the negotiations with the company on April 23 and 24 it was made clear to the company that if it did not come up with a settlement which could be ratified by the membership at the Sunday meeting, the union would call a strike which would begin on Monday, April 27, 1981. At 11:00 a.m., Sunday, April 26, 1981 the membership meeting was called to order by Local President, Beatrice Ennis who informed the membership that the Union had a contract for them to vote on. Willis testified that Ennis explained that because of the limited time involved there had not been sufficient time to provide the membership with copies of the settlement. Ennis then turned the meeting over to Willis to explain the proposed contract. Willis informed the membership that the contract was being recommended by the entire Local Committee and the International Union. He explained that he would read through each item and if there were any questions on any item, questions would be permitted at that time; however, there would be no debate on any of the items until after the entire package had been presented. Willis then read each proposal and followed by reading the previous language in the contract pertaining to that proposal. Language changes in the contract were covered first, with benefit and wage items being covered last. He informed the membership that the Union Committee had obtained the best possible offer from the Company without a strike, and that if the offer was rejected by the membership, using the above jargon of the trade, the Union would call a strike to begin the next morning on Monday, April 27, 1981. After completing the explanation of the proposals, the floor was then opened for discussion and debate. No member was prohibited from asking questions or stating opinions on the contract. After discussion, one of the members made a motion to vote on the contract. As noted previously, at no time did any member attempt to place a motion on the floor to declare the meeting out of order because of any alleged irregularity. The motion to vote on the contract carried by a large majority. Secret balloting was then conducted in an orderly manner after which the ballots were counted with the result that 212 voted to accept the contract and 178 voted to reject the contract. Thereafter, Willis advised the company officials of the outcome of the vote and, notwithstanding the union's refusal to execute the resulting collective agreement, the company implemented the settlement. Willis pointed out to the Board that of the five AFGM Local Unions in Ontario, only three have adopted a set time limit for posting special meeting notices. Local 154 representing Kelloggs in London, Local 230 representing General Mills in Toronto, and Local 210 representing Pillsbury and Ogilvie in Midland, by bylaw provision, all require that notices be posted at least 24 hours in advance of special meetings. Neither Local 327 representing Lipton in Bramalea or Local 242 have adopted bylaws which provide for a specific time limit.

10. For the complainants it was submitted that the totality of the respondent unions' conduct constituted a breach of both section 60 and 63(5). Counsel submitted that this conduct included negligent misrepresentations, insufficient notice and a failure to comply with the past practices of Local 242 in holding and conducting special meetings. It was also contended that neither union had taken adequate steps to correct the situation and that, in the result, employees were not given ample opportunity to vote. On behalf of the respondent company, it was argued that no collusion involving the company had been established and that it had an agreement with the unions. Counsel submitted that no breach of the Act on the part of these unions had been made out in his opinion but that, in any event, the company should not and could not properly be affected by any remedy. It was argued that any remedy should be confined to the trade unions and not involve a setting aside of the collective agreement. On behalf of the International it was pointed out that no constitutional provision had been violated and that the Board had to develop reasonable and practical standards in

administering sections 60 and 63(5). It was also submitted that the legislature did not intend a rigorous review of the procedure of ratification meetings in enacting section 63(5).

11. Having carefully reviewed all the evidence and the submissions of the parties, the Board finds that the alleged violations of sections 60 and 63(5) have not been made out. The standard of trade union conduct required under section 60 has been reviewed in detail elsewhere and need not be elaborated to any great degree in the instant case. See *Barber Coleman of Canada Ltd.*, [1976] OLRB Rep. Oct. 613 and *Walter Prinesdomu*, [1975] OLRB Rep. May 444. As noted in the *Coleman* case, section 60 requirements take much of their shape from the fact that union affairs are conducted for the most part by laymen and this is particularly so of local union affairs. Breakdowns in communications and errors in judgment inevitably occur. The Board has decided that, given the statutory language employed, the Legislature has acknowledged this reality of trade union organization and intended it to be accommodated in the administration of the section. In the facts at hand the local trade union's president misunderstood the "count-down" scenario worked out between the parties on March 16, 1981. On April 23, 1981 the union was therefore confronted with the dilemma of going ahead with the two days of negotiations and the planned ratification meeting of April 26, 1981 or postponing everything. It concluded that the time remaining was adequate for the calling of the special meeting. We note that other locals of the same trade union require only that twenty-four hour's notice be given. A large number of employees obviously received notice and the employee turnout appears to have been representative of previous attendance at such meetings. Not one objection was registered at the meeting with respect to lack of notice, the conduct of the meeting, or to the format of the meeting. No motion was made to set the meeting aside. The proposed contract was fully explained; questions were entertained; and a secret ballot vote was conducted. The failure of a union official to sign the meeting notice is a mere technical irregularity and the number of microphones and the lack of a handout appear to be equally insignificant on the facts before us. We are satisfied by the voter turnout and direct evidence that by Friday, April 24, 1981 it was clear that the notice was official. Admittedly, many employees may have been inconvenienced but this is not unusual in the setting of negotiations where events surrounding settlements can be swift. Having regard to all of these facts, it cannot be said that either section 60 or section 63(5) were violated. In the circumstances, we are satisfied that all bargaining unit employees were given a reasonable opportunity to participate in the secret ballot vote and we do not agree that section 63 was intended to set down a rigid standard of trade union procedure for strike and ratification votes. Nothing done in the instant case strikes us as so patently unfair or unreasonable to merit intervention under this section. See *RCA Limited*, [1981] OLRB Rep. Aug. 1159. To intervene in the instant case would set this Board on a course of detailed regulation we are reluctant to embark upon. Trade union democracy is amply suited to handling controversy of this kind.

12. The complaint is dismissed.

0238-81-R Joseph Brant Memorial Hospital, Applicant, v. International Union of Operating Engineers, Local 772, Respondent, v. Canadian Union of Public Employees, Local 1065, Intervener.

Termination – No employees in the bargaining unit – Union failing to bargain – Whether Board exercising discretion to terminate bargaining rights in circumstances – Whether jurisdictional dispute requiring redefinition of bargaining units

BEFORE: M. G. Picher, Vice-Chairman and Board Members W. H. Wightman and H. Kobryn.

APPEARANCES: *D. W. Brady and W. J. Lyall for the applicant; Fred G. Grigsby and Ed Herechuk for the respondent; Raymond Quinn and Dave Reid for the intervener.*

DECISION OF THE BOARD; August 12, 1981

1. This is an application for a declaration terminating the bargaining rights of the respondent union under section 51 of the Act.

2. The respondent, (hereinafter “the Operating Engineers”) holds the bargaining rights for all stationary engineers employed in the Joseph Brant Memorial Hospital at Burlington. The intervener, the Canadian Union of Public Employees, Local 1065 (hereinafter “CUPE”) is the bargaining agent for a unit of maintenance employees at the Hospital.

3. The following are the material facts established by the evidence: The Operating Engineers and the Hospital were parties to a collective agreement which commenced April 1, 1978 and terminated March 31, 1980. That collective agreement, which was the result of an interest arbitration award was signed under protest by the Hospital. It had sought unsuccessfully to oppose the arbitration on the grounds that it no longer employed operating engineers. The evidence establishes that effective January 1, 1979 the Hospital converted its boiler room, installing coil tube boilers whose maintenance does not require the employment of stationary engineers. Of the seven stationary engineers then employed four were reclassified as maintenance mechanics, one retired and two left to find work elsewhere as stationary engineers. Thereafter the hospital treated the work in the boiler room as being performed by maintenance employees represented by CUPE, and made dues deductions accordingly.

4. Initially the Operating Engineers appeared to accept the change. In a letter to the Hospital’s executive director dated February 7, 1978 George S. Donaldson, then union representative of the Operating Engineers stated:

Dear Mr. Butcher:

1. Received your letter of notice dated January 26, 1978 along with our members seniority list.

2. We would still however require negotiating a new Collective Agreement for our members to cover the time remaining.

3. It is still our responsibility to ensure our members ample protection

for wages, severance pay ect., etc., prior to actual date of coil tube boiler operation.

4. At your convenience, but I would hope, sometime soon, please submit to me some meeting dates open to you and I will confirm.

Yours Truly,

Geo. S. Donaldson,
Business Representative.

5. Some time after that, however, the Operating Engineers had a change of business manager and an abrupt change of position. They gave notice to renew the collective agreement which expired on March 31, 1978 and pressed the matter to an interest arbitration, the first hearing of which took place on July 10, 1979. The Hospital maintained that the Board of Arbitration had no jurisdiction to adjudicate the terms of a collective agreement because there were no employees in the bargaining unit. It was clear, however, that an agreement could apply for the period between April 1, 1978 and December 31, 1978, the last day of work for the stationary engineers. The Board of Arbitration rejected the Hospital's submission and, in a preliminary decision dated July 20, 1979, found that it could not, under the terms of *The Hospital Labour Disputes Arbitration Act*, declare that the union's bargaining rights were terminated nor decline to resolve the dispute submitted to it, even though there might be no employees in the bargaining unit at the time.

6. At page 8 of the arbitration award the Board, chaired by Mr. J. D. O'Shea, commented:

Article 9 of the [Hospital Labour Disputes Arbitration] Act makes it abundantly clear that the proper forum for terminating the Union's bargaining rights is *The Ontario Labour Relations Act*. In this regard, even though there is no longer a requirement for the Employer to employ Stationary Engineers as such, in view of the fact that they no longer operate pressure vessels, the Ontario Labour Relations Board may determine that the Union continues to represent employees who, according to established trade union practice, were commonly associated in their work with Stationary Engineers and were therefore included in the craft bargaining unit represented by the Union pursuant to the provisions of Article 6.2 of *The Labour Relations Act*.

However that may be, this Board has no jurisdiction to determine whether the Union continues to represent such employees. In view of the provisions of Section 5.6 of *The Hospital Labour Disputes Arbitration Act*, we find that there is a statutory presumption that we have the necessary jurisdiction to make the determinations for which we were appointed, i.e., to deal with all matters in dispute between the parties (subject to the specific restrictions on our jurisdiction referred to above) until a collective agreement is in effect between the parties.

Our interim award, therefore, is that a further hearing will be

convened by the Board to deal with the merits of the interest dispute for the purpose of determining the provisions to be included in the collective agreement between the parties.

7. By a further decision dated January 11, 1980 the Board of Arbitration rendered the final award which established the terms of the collective agreement from April 1, 1978 to March 31, 1980. It is common ground that while the employees in question were treated under the collective agreement retroactively from April 1, 1978 to January 1, 1979, thereafter the four employees retained were treated for all purposes as falling under CUPE's maintenance employees collective agreement. From that time on no dues were remitted to the Operating Engineers.

8. On August 13, 1979 the Operating Engineers, under a new business manager, filed a policy grievance against the alleged non-remittance of dues in respect of six maintenance employees. The grievance was apparently not pressed to arbitration. The Operating Engineers attempted to revive it, however, by a further policy grievance to the same effect filed on March 31, 1981.

9. On March 4, 1980 the Operating Engineers gave notice of their desire to renegotiate the collective agreement. At a meeting in June of 1980 the Hospital responded that the bargaining unit being vacant, there was nothing to negotiate. It heard nothing further from the union until February 18, 1981 when the union wrote the hospital requesting a resumption of negotiations. At a subsequent meeting on March 13, 1981 the Hospital reiterated its position. Nothing further was resolved. On April 10, 1981 the union applied for conciliation which was granted on May 13, 1981. Before conciliation was granted, on May 13, 1981, this application was filed.

10. Counsel for the Hospital states that this application is the only means which the Hospital can see to get itself off what it perceives as a pointless merry-go-round of bargaining and mandatory interest arbitration with the Operating Engineers. In its view there are no employees in the bargaining unit, and indeed no job classifications, vacant or otherwise, in the hospital that could be covered by any collective agreement with the Operating Engineers. The Hospital maintains that under the *Hospital Labour Disputes Arbitration Act* absent a declaration terminating the bargaining rights of the Operating Engineers it is destined to submit to interminable and costly rounds of negotiations and arbitration in respect of non-existing jobs or employees. It submits that insofar as the Operating Engineers allowed some eight months to elapse between the negotiation meeting of June 1980 and the resumption of negotiations in February of 1981 the conditions of section 51(2) of the Act are met and a declaration terminating the union's bargaining rights should be granted.

11. It appears on the evidence before the Board, however, that there is more to the case. According to the evidence adduced by the Operating Engineers, apart from the initial acquiescence of its first business representative — who was subsequently discharged, the Operating Engineers have continuously asserted jurisdiction over employees in the revised job classifications. The Operating Engineers claim jurisdiction to the extent that the employees in question perform maintenance functions associated with stationary engineers prior to the changeover on January 1, 1979. It appears that the union took that position before the Board of Arbitration chaired by Mr. O'Shea and continued to do so by filing grievances on August

13, 1979 and March 31, 1981, as well as by giving notice to re-negotiate its collective agreement.

12. If, as the Hospital maintains, there are no employees in the bargaining unit represented by the Operating Engineers, its application places the Operating Engineers in a strange position. On the one hand the Hospital takes issue with the union for not negotiating with sufficient diligence; on the other hand in repeated meetings with the union it has consistently insisted that the Operating Engineers should not be negotiating at all. At the least the Board must have some concern as to whether, if there has been delay in excess of the time contemplated in section 51(2) of the Act, the conduct of the applicant has in some measure lulled the union into the position which the Hospital now claims as justification for the termination of its bargaining rights. There is, of course, no suggestion that the Hospital has deliberately sought to entrap the union. The facts before the Board arise from a complex situation in which the parties' own perceptions of their respective rights have evolved slowly and with understandable uncertainty.

13. Insofar as there may be employees in the bargaining unit what is before the Board is essentially a jurisdictional dispute. The Hospital and CUPE take the position that all maintenance work in the hospital, including some maintenance previously performed by stationary engineers, is within the scope of CUPE's collective agreement. The Operating Engineers claim that that work is within their exclusive jurisdiction, being work performed by stationary engineers prior to January 1, 1979.

14. Assuming that the pre-conditions of section 51(2) are made out, we would not exercise our discretion in the instant case to terminate the union's bargaining rights. The Board does not generally terminate bargaining rights for a failure to bargain for certain job classifications or for an entire bargaining unit when there are no employees to be bargained for. Therefore we see no reason, even if we should conclude that the Hospital is correct, why that should be the basis of a termination in the instant case. We are not persuaded by the argument of counsel for the Hospital that this an exceptional situation because it occurs in respect of a defunct craft in a Hospital.

15. It is clear on the material before us that the union does not see itself as defunct nor its bargaining unit as vacant. It is also clear that more appropriate means are provided under the Act to resolve the dispute between the Hospital and the Operating Engineers. The Board's jurisdiction in respect of a jurisdictional dispute under section 81(18) of the Act includes a wide latitude to clarify and redefine bargaining units as may be appropriate in any given case. That may be done at the request of the employer or either union where bargaining unit descriptions are in conflict. We cannot accept, assuming that a jurisdictional dispute were filed by the Hospital and the application resulted in a determination vindicating the Hospital's interpretation of the two collective agreements, with an order clarifying the bargaining unit of the Operating Engineers accordingly, that the "merry-go-round" would continue to turn. We accept the undertaking of the representative of the Operating Engineers that it would not.

16. The Board might have treated this application as a jurisdictional dispute. During the hearing we inquired whether the Hospital would consent to the case being adjourned to allow the parties to prepare and have the matter treated on that basis. A jurisdictional dispute can only be resolved on an application specifically relating to a work assignment. The Hospital declined, and the Board is therefore forced to dispose of the application on its merits.

17. For the reasons related above, the Board does not, in the circumstance of this case, terminate the bargaining rights of the Operating Engineers. The application is therefore dismissed. The Board's disposition of the application is without prejudice to the right of the Hospital or of either union to file a complaint in the nature of jurisdictional dispute.

0043-81-R Labourers' International Union of North America,
Local 183, Applicant, v. **Karvon Construction Limited**, Respondent.

Employer – Whether labourers employed by project manager on site or project owner –
Board reiterating its concern with form as well as realities – Requiring evidence that realities different
from form

BEFORE: Ian Springate, Vice-Chairman, and Board Members C. A. Ballentine and W. H. Wightman.

APPEARANCES: *L. Richmond and T. Dionisio for the applicant; E. A. DuVernet, Q.C., M. A. Wilkinson and Nicholas Karababas for the respondent.*

DECISION OF THE BOARD; August 21, 1981

1. This is an application for certification filed pursuant to the construction industry provisions of *The Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*.

3. The applicant seeks to be certified to represent certain construction labourers engaged in general cleanup duties on the Normandy Place residential housing project in Oakville. It is the contention of the applicant that these labourers are the employees of the project manager on site, Karvon Construction Limited ("Karvon") and accordingly it named Karvon as the respondent in these proceedings. Karvon, however, contends that the labourers are in fact employees of the owner of the project, namely, Oakville Community Homes Incorporated ("Oakville"). It is not disputed that all other tradesmen on the project are employees of various specialty contractors awarded contracts on the project by Oakville.

4. At the hearing, counsel for Karvon set forth the facts he claimed were relevant to the issue of which company employed the employees in question, and these were accepted as correct by counsel for the applicant. For his part, counsel for the applicant added only that the employees "feel" that they work for Karvon, a statement accepted by counsel for Karvon. Having agreed with each other concerning the facts they desired to put before the Board, neither counsel called any viva voce evidence.

5. Apart from the statement that the employees "feel" that they work for Karvon, the facts agreed to by counsel primarily relate to the formal arrangements between Oakville and Karvon, and with the "form" of the employment relationship covering the construction

labourers and the project superintendent who hired the labourers and directs them in their work. These facts indicate that at least in terms of "form" the superintendent and the construction labourers are employed by Oakville. Indeed, on the basis of the material put before us, Karvon's functions appear to be limited to performing certain routine tasks on behalf of Oakville, acting as an advisor to Oakville, and serving as a conduit through which Oakville pays its accounts.

6. In his submissions to the Board, counsel for the applicant contended that notwithstanding the formal relationship between Oakville and Karvon, and the fact that Oakville appears to have the final decision-making authority with respect to the job in question, the Board should assume that Karvon, with its expertise, in fact makes all the important decisions affecting the project, including all decisions with respect to the hiring and direction of the superintendent and the construction labourers, and that accordingly the Board should conclude that Karvon is their true employer. In determining which of two or more companies is the employer of a group of employees, the Board concerns itself not only with form and appearances, but also with the realities of the situation. See: *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538 and the cases cited therein. In the instant case, however, no evidence was led or facts agreed to which would establish that the realities of the employment relationship governing the construction labourers are such that the Board should conclude that Karvon is in fact their true employer. Having regard to the role that construction industry project managers usually perform, it is easy to speculate as to whether Karvon in fact has true decision-making authority on the project, and whether the project superintendent reports to, and takes direction from, officers of Karvon. However, the Board cannot act on the basis of speculation but must instead rely on the material actually put before it. On the material before us, we cannot conclude that Karvon is the employer of the employees sought to be represented by the applicant. Accordingly, the application is hereby dismissed.

0402-81-R Mohawk Construction Limited, Applicant, v. International Union of Operating Engineers, Local 793, Respondent.

Termination – Delay in seeking to bargain – Delay due to internal difficulties within union – Whether justifying delay – Whether request for conciliation curing delay – Whether Board exercising discretion to terminate

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and M. J. Fenwick.

APPEARANCES: *Art Watson for the applicant; E. A. Ford for the respondent.*

DECISION OF THE BOARD; August 25, 1981

1. The name: "The international Union of Operating Engineers Local 793" appearing in the style of cause of this application as the name of the respondent is amended to read: "International Union of Operating Engineers, Local 793".

2. The applicant Mohawk Construction Limited ("Mohawk") has applied to the Ontario Labour Relations Board under section 51 of *The Labour Relations Act* for a declaration that the International Union of Operating Engineers, Local 793 ("the union") no longer represents the employees in the bargaining unit referred to below for which the union is the bargaining agent.

3. This is an application coming under subsection 2 of section 51 of the Act, since the union has given notice pursuant to section 13 of the Act. Subsection 2 provides as follows:

Where a trade union that has given notice under section 13 or section 45 or that has received notice under section 45 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

4. It is undisputed that the parties met on February 4, 1981 and commenced bargaining for a collective agreement. After that a period of more than 60 days elapsed during which the union did not seek to bargain. Since no conciliation officer had been appointed in that interval, it becomes a matter of whether the Board will exercise its discretion under section 51(2) to declare that the trade union no longer represents the employees in the bargaining unit.

5. The facts in this case are few, relatively straightforward and not in dispute. The bargaining unit affected by this application is described as follows in a certificate issued to the union under section 131a(2) of the Act:

All employees of Mohawk Construction Limited in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.

At the meeting on February 4th, 1981, the union sought to obtain the employer's agreement to be bound by a collective agreement which the union has with excavating contractors in the construction industry. The employer contended that it was primarily a road building contractor and that it wished to bargain on the basis of the collective agreement which the union has with road builders. That is as far as the negotiations got that day and nothing further developed for some twelve weeks until on April 30th the union applied to the Minister of Labour for the appointment of a conciliation officer in the dispute. The employer registered his written objection to the request by letter dated May 6, 1981, a copy of which the employer sent to the union. Although the evidence before the Board does not pinpoint either the fact or

the date when a conciliation officer was appointed, both parties believe that an officer was appointed on May 7 and they met with the officer on May 19th. The parties met with the officer for approximately an hour and did not alter the positions which they had taken on February 4th. The officer advised the parties that, in view of their positions, he would be recommending to the Minister that no conciliation board be appointed. Subsequently, by letter dated May 25th, the parties were advised that the Minister would not appoint a conciliation board in their dispute. This application was made May 21st, 1981.

6. The union was unable to explain to the Board why it allowed twelve weeks to elapse without seeking to bargain with the employer except to say that the delay might have been caused by oversight resulting from internal administrative problems which it claims it was having during that period.

7. The nature of the Board's discretion under section 51 of the Act was described in the following terms in its decision in *Dominion Stores Limited*, 56 CLLC ¶18,047:

The purpose of section 43 [now section 51] of the Act is to protect the employees and in a proper case, the employer against a union which stakes out a claim to represent certain employees and then takes no steps within a reasonable time to forward the interests of those employees. However, the section is to be used as a shield, not as a sword. Section 43 [now section 51] should not be used to penalize a union which has failed to give notice under section 10 [now section 13] of the Act, but rather to afford an opportunity for an interested party to bring that fact to the attention of the Board so that the Board may call upon the union to give an explanation for the delay in commencing or continuing negotiations as the case may be. If no satisfactory explanation is forthcoming, the Board will no doubt in many cases terminate the bargaining rights of the union instantaneously.

The Board looks at the conduct of the parties during the whole period from the giving of notice to bargain to the filing of the application under section 51 in order to decide how to exercise its discretion. See *The John Oliver Lumber Company of Toronto Limited*, [1963] OLRB Rep. Aug. 280. In the case at hand, there is nothing about the parties' conduct prior to the February 4th meeting which is of assistance to the Board. While the union's explanation for not seeking to bargain for a period of twelve weeks is hardly satisfactory, there can be no doubt that its request for conciliation services was a serious attempt to resume bargaining.

8. The fact that the union has, without satisfactory explanation, allowed 12 weeks to elapse during which it made no attempt to bargain certainly leaves something to be desired. This lack of diligence in pursuing its bargaining rights, however, has been cured by its renewed interest in them as evidenced by the request for conciliation services which it made on April 30th. Since that step to resume the exercise of its bargaining rights was taken prior to the filing of this application, no purpose would be served now by terminating those bargaining rights. See the Board's decision in the *Village of Point Edward Public Works Department*, [1966] OLRB Rep. Nov. 615. Therefore the Board finds that these are not circumstances in which it should exercise its discretion to terminate the union's bargaining rights.

9. This application is dismissed.

0061-81-U Nicolas Finney, Complainant, v. United Electrical, Radio and Machine Workers of America (UE), Respondent, v. RCA Limited, Intervener

Ratification vote – Section 79 – Allegations that manner of conduct of ratification vote did not protect secrecy of voters – Whether contravention of Act – Board interpreting requirements of section 63(5)

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and D. B. Archer.

APPEARANCES: *Nicolas Finney for the complainant; Art Jenkyn and Dick Barry for the respondent; Rober A. Macpherson, Morris Monteith and Michael McGullough for the intervener.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER D. B. ARCHER; August 12, 1981

1. This is a complaint under section 79 of the Act whereby an employee alleges that the respondent (hereinafter “the U.E.”) has conducted a ratification vote in a manner contrary to section 63(4) of the Act. The section provides as follows:

63.-(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

2. The facts are not substantially in dispute. On November 16, 1979 the U.E. was granted interim certification as bargaining agent of the office, clerical and technical employees of RCA Limited at its plant in Midland. A number of challenges were raised respecting the composition of the bargaining unit, and following examinations a final certificate issued on November 5, 1980.

3. Negotiations for the first collective agreement were long. The first meeting between the union and the employer took place on February 28, 1980. After some 20 bargaining meetings, on January 24, 1981 the union and the company signed a memorandum of agreement. While the memorandum did not expressly require ratification it provided in part:

The undersigned representatives of the Company and the Union agree to recommend the above settlement to their principals for acceptance.

4. On Saturday, January 25, 1981 the U.E. held a meeting of the employees in the bargaining unit at the Athenian Hall in Midland. The union’s negotiators, led by U.E. president Dick Barry, then gave a verbal account of the tentative settlement; they had no written copy of the memorandum to distribute, the agreement having been concluded at 4:30 a.m. that morning. It was then resolved to convene a further meeting to consider the proposed settlement at the same location on February 1, 1981. The evidence establishes that between January 25 and February 1, 1981 copies of the full proposed collective agreement were circulated to all employees in the bargaining unit. The meeting of February 1, 1981 was

convened with some 90 employees present. At that meeting, a vote was conducted. While it is not the vote impugned in this complaint, the union maintains that it is relevant to the case before the Board.

5. The evidence establishes that the complainant, Mr. Finney, was the most outspoken participant in the meeting. As an employee in the bargaining unit, Mr. Finney had led a unsuccessful attempt to stop the union's certification and subsequently sought, again without success, to have the department in which he works excluded from the bargaining unit. At the meeting Mr. Finney expressed strong dissatisfaction with the proposed settlement and urged that it not be adopted as a collective agreement. After considerable discussions a vote was taken on whether to go back to the company to bargain for an improved settlement.

6. The evidence relating to the voting procedure followed at the meeting of February 1, 1981 is less than clear. Mr. Finney testified that he was not positive in his recollection of the method of balloting which the union then used, but that he believed that it was similar to the method used at a later union meeting on February 22, 1981, the vote that is the subject of this complaint. Unfortunately, in his evidence Mr. Barry did not explain the voting method used on February 1, 1981. The best evidence on this point in the Board's view is that of Mr. Clinton Todd, an employee in the unit who came to the hearing as a witness for the union. Mr. Todd, whose evidence was generally forthright and clear, testified that according to his recollection at the meeting of February 1, 1981, printed ballots were handed out to the employees, were marked secretly and were then placed in a box prior to counting. There is no dispute as to the result of the vote: the proposed settlement was rejected by a count of 57 to 33. Neither Mr. Finney nor any other employee has complained about the conduct of the ratification vote on February 1, 1981.

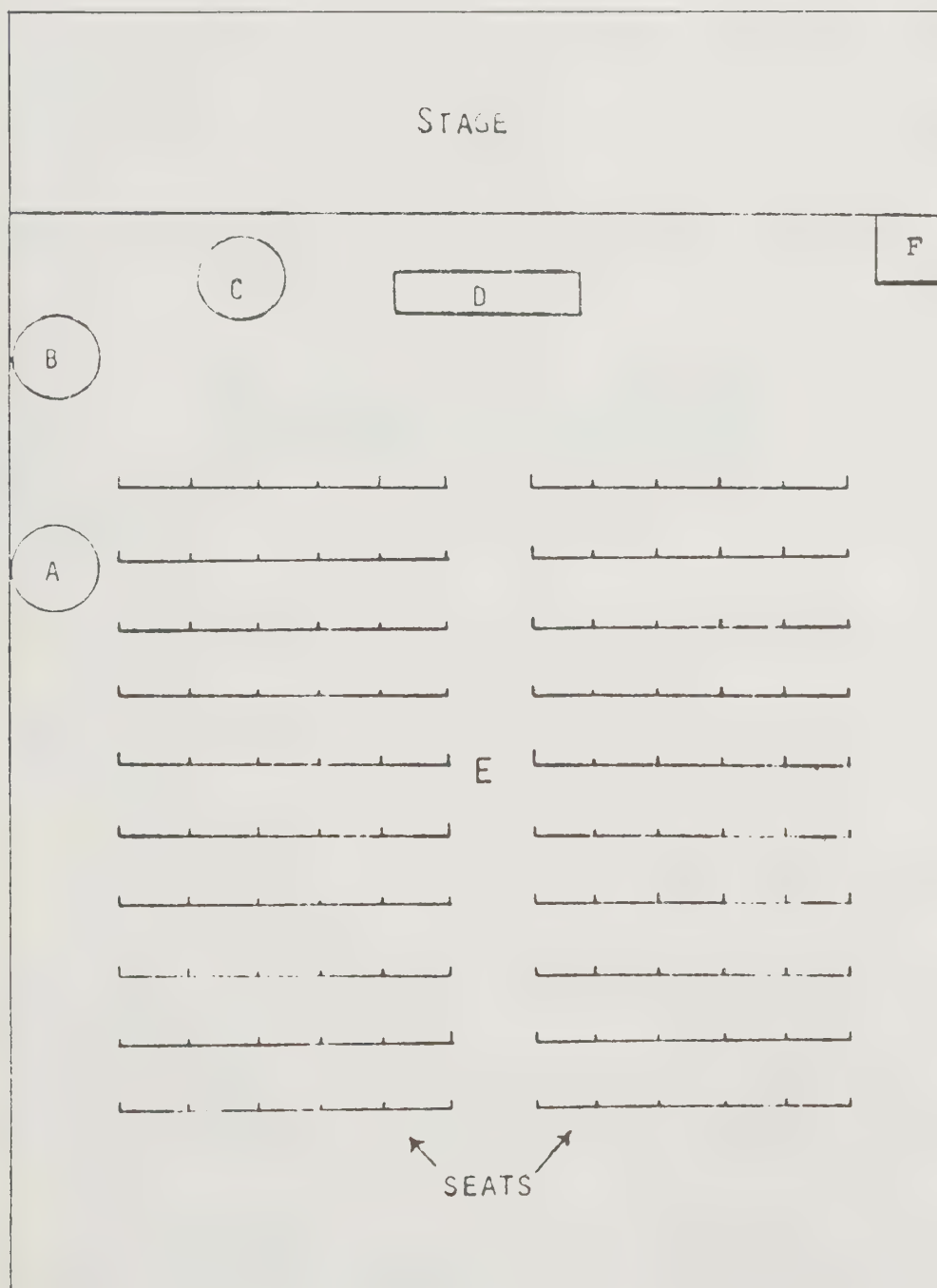
7. Following the vote the union sought a resumption of negotiations. It contacted the conciliation officer who had been working with the parties and advised him that the union wanted a no-board report, the administrative pre-condition to a strike under the Act. A no-board report issued from the ministry on February 6, 1981, leaving the parties in a position to strike and lock out fourteen days later. On February 17, 1981 the parties met again through a mediator. There was no movement; the employer held adamantly to its offer of January 24, 1981. Forced with the option of pursuing an apparently fruitless negotiation, striking or accepting the company's offer, the union called a further ratification meeting for February 22, 1981. That ratification, held again at the Athenian Hall in Midland, gives rise to this complaint.

8. There is no material dispute as to what happened at the meeting of February 22, 1981. The employer's proposal was thoroughly discussed and debated, with a full opportunity being given for all present to participate. There is no complaint before us as to the adequacy of notice to the employees of the meeting or of its conduct in so far as the discussion is concerned.

9. After discussion a motion was put on the floor to take a ratification vote. It carried 52 to 26 on a show of hands. Mr. Gerry McBride, an employee in the bargaining unit who is the president of local 568, then selected three employees from the body of the meeting to act as tellers or returning officers for the vote. The three employees selected, Clinton Todd, Ron Bednarz and Sharon Rake, are not union officers. The complainant does not dispute that they were selected as impartial scrutineers who know the employees and who enjoy their trust and

respect. Indeed, in the balloting process that followed, he does not allege any actual impropriety or breach of trust on their part.



10. To appreciate the voting procedure it is helpful to refer to a diagram of the Athenian Hall as it was set up for the taking of the vote.



It appears that the Hall is some 44 feet long and 35 feet wide. Area E on the diagram represents the body of the assembly where the employees were seated. The union executive occupied table D, although during the balloting it appears that they vacated that location and stood in a stairwell located at F. Generally speaking, the conduct of the vote was left entirely to the three tellers.

11. The balloting was conducted at three tables located at A, B and C. There was some slight variance in the evidence as to the precise location of table B in relation to the first row of seating, and as to whether table C was in line with tables A and B. We are satisfied that those differences are not material to the disposition of this complaint. If the differences in the evidence must be resolved, we would prefer the evidence of Mr. Todd, which confirms the location of the tables as represented on the above diagram.

12. The evidence establishes that the employees lined up to vote behind table A, along the left aisle, with the file of employees extending towards the rear of the hall. At table A each employee was given a printed ballot in the following form:

	BALLOT	
I ACCEPT THE RECOMMENDATION BY THE NEGOTIATING COMMITTEE TO ACCEPT THE COMPANY OFFER.		MARK X
I REJECT THE RECOMMENDATION AND VOTE FOR A STRIKE.		MARK X
(70% of those people voting must authorize a strike as required by the U.E. Constitution.)		

13. Voters then proceeded individually to table B, which was bare except for a pen lying on it. There they marked their ballot. According to the instructions given each voter then folded his ballot in half and proceeded to table C where the ballot was collected by Mr. Todd who stood alone behind table C with his back to the stage. It is clear that voters were alone at table B. Each employee was given a ballot at A and was allowed to proceed to B as the voter before him left that station. The evidence establishes that the distance from table A to B was approximately 12 to 15 feet, as was the distance from B to C.

14. There was no ballot box or container to receive the ballots at table C. The evidence of Mr. Todd, which we accept without reservation, is that he initially decided to lay the ballots in overlapping piles or rows on the table. This he did to keep track of the numbers; according

to him, knowing the number of ballots in each row he could readily count the ballots collected and avoid the possibility of double balloting.

15. Mr. Todd began to collect ballots in that fashion in rows of 10. After a few minutes, however, the ballots started coming too fast, and after two or three rows were collected, he had to foresake his orderliness, and the balance of the ballots were placed in a single pile in the centre of the table.

16. When all employees had voted the three tellers counted the ballots at table C, in full view of the assembly. There is no suggestion in the evidence, nor is it alleged, that the scrutineers or anyone else in the hall identified or sought to identify the ballot or choice of any employee. Nor is there any evidence, having regard to the integrity and reputation of the three scrutineers, that any employee feared, or had any reason to fear that Mr. Todd or the other scrutineers would identify their choice on the ballot. The evidence of Mr. Todd is that given the size of the ballot and the distance between tables B and C he probably could, had he tried, have seen a ballot as it was being marked by an employee who did not conceal or screen it with his hand. He made no such attempt. Mr. Todd testified that he did not see how any employee voted save for one who made an open display of spoiling his ballot. When the ballots were counted, the result was 51 to 49 in favour of ratification, with one ballot spoiled.

17. No employee, including the complainant, took any objection to the balloting as it proceeded at the meeting on February 22, 1981. Mr. Finney's own evidence disclosed that he was not upset or disturbed by the method of balloting as it was carried out at the meeting. He testified that it was only one or two days later that he learned of the requirement of section 63(4) of the Act, and formed the opinion that the method of balloting could be challenged.

18. On February 25th, three days after the vote, Mr. Finney wrote to the Registrar of the Board alleging a violation of section 63(4) of the Act. By letter dated March 5, 1981 the Board's solicitor replied, advising Mr. Finney in part as follows:

Although your letter does set out an allegation that the trade union has violated section 63(4) of the Act, the complaint cannot be processed in its present form.

I am enclosing herewith six (6) copies of Form 32, and the Guide to *The Labour Relations Act*. When completing the form, you must set out clearly the names and addresses of the persons or trade unions against whom you are seeking a remedy, your name and address, the section or sections of the Act which you believe have been violated, and a concise statement of all of the material facts upon which you intend to rely in order to establish the violation.

Upon receiving the complaint in the proper form, the Board will appoint a Labour Relations Officer to meet with the parties and attempt to settle the matter. If the matter cannot be settled, a scheduled hearing before the Board will take place at which time you will be called upon to lead evidence and make arguments in order to establish that the violation as you have alleged has occurred and that you are entitled to the remedy you seek. At that hearing, the trade union and any other interested party

will be entitled to be present, to cross examine your witnesses, and to lead their own evidence in their defence.

While it is not necessary for a party to a Board proceeding to be represented by a lawyer, it may be appropriate for you to consider consulting with either legal counsel or someone experienced in labour relations matters to assist you in the preparation of the case or in the drafting of the complaint, since the complaint will form the basis of your case before the Board.

19. A formal complaint was finally filed on April 6, 1981. Mr. Finney's explanation for the delay is that he followed the advice of the Board's solicitor and expended some time consulting with a labour lawyer in Toronto. Apparently it was only after several weeks had passed in that effort that he concluded that he could not afford the cost of counsel and decided to proceed with a formal complaint in which he would represent himself. If, as the union argues, there was undue delay in perfecting the complaint, some allowance must be made in mitigation, given the complainant's promptness in first writing to the Board within two days of the event. It appears however, that while he complained promptly to the Board, Mr. Finney made no attempt to register any protest directly with the union, nor to give any notice to the employer that the union's ratification of the memorandum of settlement was under challenge. In the result, the union lived under the terms of the memorandum of settlement treating it as a binding collective agreement for some two and a half months before receiving notice of Mr. Finney's complaint.

20. The hearing of the complaint initially scheduled for May 5, 1981 was adjourned to June 1, 1981 on the agreement of Mr. Finney and the union. At the initial hearing, when it became apparent that the employer did not receive notice of the complaint because Mr. Finney did not name the company as an interested party, the Board adjourned, of its own motion, to June 30, 1981 to give notice to both the company and the employees who might be affected by the complaint. In the result, it appears that the complaint reached the attention of the employer and the employees some four months into the term of their collective agreement, which runs one year, and expires on February 22, 1982.

21. Mr. Finney's complaint is twofold. He maintains firstly that the manner of the ratification vote violated section 63(4) of the Act in that there was no screen or curtain erected at table B where ballots were marked. He submits that a person standing at A or C could, with some deliberate effort, see how a voter stationed at B was marking his or her ballot. Secondly, he submits that the gathering of the ballots, in ordered rows of ten on a table, rather than in a ballot box or some other container, allowed the returning officer the possibility of knowing, by remembering whose ballot was whose, how individual employees voted. He requests that the Board set aside the vote and itself conduct or supervise another ratification vote conforming to the requirements of section 63(4) of the Act.

22. Counsel for the company submits that the method used by the U.E. in the ratification vote of February 22, 1981 violates section 63(4). He argues that the purpose of the section is to eliminate coercion or undue influence and ensure freedom of choice by avoiding any possibility of apprehension in any employee that his vote for or against a contract or a strike could be known. He maintains that a reasonable employee representing himself to vote knowing that his ballot would be place upon a table, could harbour a natural fear that a

scrutineer would be in a position to identify him with the choice expressed on his ballot. He stresses the closeness of the result of the vote urging that in these circumstances the slightest irregularity could have a decisive impact. He submits that if only two or three employees were influenced in their choice by the manner of the vote it could have made the difference in the result. Counsel for the company also argued that the paper used for the balloting was too light, and that a scrutineer could, by examining a ballot closely, see through the reverse side of a ballot and discern which way it had been marked. Mr. Finney did not, however, ground his complaint on the thickness of paper used for the ballots.

23. The representative of the union argues that the balloting does not violate section 63(4). He submits that the section is not violated where the evidence discloses only a possibility that the secrecy of a ballot might be violated. He stresses that trust in a returning officer is inherent in any voting procedure. With respect to Mr. Todd, he points out, as the Board noted during argument, that voters in provincial and federal elections in Canada are presently required to hand their folded ballot to a returning officer whose task it is to insert the ballot in a box. He submits that if a federal or provincial returning officer could improperly unfold and read an elector's ballot before inserting it in the ballot box, governmental elections are no more or less secure in their secrecy than the vote which the local conducted in reliance on the integrity of Mr. Todd.

24. The union maintains that Mr. Finney's protest is more technical than substantial, noting that he raised no complaint during the course of the balloting nor at any time subsequently, with any official of the union. It emphasises Mr. Finney's admission that neither he nor any employee has reason to believe, nor does believe, that Mr. Todd violated the trust placed in him. The union submits that nowhere does section 63(4) specifically require that a ballot box be used. It maintains that the marking of the ballots in isolation at table B, followed by their being placed, folded, on table C complies with the requirements of section 63(4).

25. Finally, and in the alternative, the U.E. submits that if the Board should find that the letter of section 63(4) has been breached, that no remedy beyond a declaration should issue. In this regard it asks the Board to assess Mr. Finney's motives, which it maintains are more consistent with undermining the union than with redressing a truly felt complaint. It submits that the complainant seeks in fact to convert the ratification vote into a vote on the union's bargaining rights. It maintains that given the good faith displayed by the union and the returning officers, the fact that the complainant raised no protest with the union either at the time or after the vote, and in fact that a resulting collective agreement has been in place for months, that a new vote should not be ordered.

26. The facts and issues raised by this complaint require the Board to consider closely the history of section 63(4), the policy considerations underlying it, and the mischief to which the section is addressed. The section touches in some measure the long debated question of the extent to which there should be public regulation of the affairs of trade unions. As a representative organization a trade union is in a unique situation. A political party or any voluntary association can, and usually does, restrict to its members the right to participate in meetings, to vote and to otherwise influence policy. Originally that is how unions functioned. Unions have, however, become more regulated by existing labour relations statutes in the conduct of their internal affairs. (See, generally, Wilson, *Political Organizations*, New York, 1973 pp. 119-20.) In part because of the considerable power a union can exert over the lives of the employees it represents, notably through control of the grievance process, closed shop

agreements and the hiring hall, the Legislature, like the law making bodies of other jurisdictions, has gradually developed safeguards in a number of general practices and procedures used by unions in the representation of employees. The statutory duty of fair representation, requirements for the disclosure of financial statements, the regulation of union trusteeships and the requirement of secrecy in strike and ratification votes are examples of those developments as reflected in the Act today.

27. In the United States breaches of trust and serious instances of corruption, albeit in a small minority of unions, were brought to public attention by the report of the McLellan Committee in 1957. In 1959 the United States Congress responded by the passage of *The Landrum-Griffin Act* requiring, among other things, that union members be guaranteed the right to vote, by secret ballot, in union elections at least every three years. Citing past abuses in its preamble, the Act also established a bill of rights for union members, protecting among other things, the freedom of speech and assembly of union members and providing safeguards against disciplinary actions without due process. (See, generally, Bok and Dunlop, *Labor and the American Community*, New York, 1970, pp. 64-91.)

28. During the same period in Britain public concern was aroused by a series of prominent court cases involving union electoral malpractices. (See C. H. Rolph, *All Those in Favour? The E.T.U. Trial*, (London 1962)). The U.K. *Royal Commission on Trade Unions and Employers' Associations 1965-68* (The Donovan Report), (June 1968) articulated the need for greater public accountability in the affairs of unions, commenting (at para. 1069), "Because of the connection between union membership and members' livelihoods trade unions cannot be regarded simply as voluntary clubs from the members' point of view." The Commission made extensive recommendations including the establishment of a public authority to review complaints of electoral malpractice in union elections and to provide redress from internal union procedures that violate standards of natural justice.

29. The need for special statutory protections for the individual rights of union members was a natural consequence of the limitations of the common law. Traditionally the common law courts did not embrace the prospect of litigation over internal union matters. (See Summers, *Legal Limitations on Union Discipline* (1950), 64 *Havard Law Rev.* 1049 at p. 1051.) Gradually, however, as union membership became a more critical commodity, through theories grounded in contract, tort and the prerogative writs, courts in both the United Kingdom and Canada fashioned judicial remedies for individuals aggrieved by the internal actions of their union. (e.g. *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (CA); *Orchard v. Tunney*, [1957] S.C.R. 436; *Stern v. Seafarer's International Union of North America*, [1961] S.C.R. 682; and see, generally, E.E. Palmer, *Task Force on Labour Relations* (Study No. 11), (The Woods Report) Queen's Printer, Ottawa, 1970, at pp. 313-26.) There appear to be no reported cases, however, of individual actions in the courts to enforce secret ballot strike or ratification votes.

30. Recourse to the courts by individual union members was ultimately perceived as too costly and too slow to redress the grievances of rank and file workers (see, e.g. *The Donovan Report*, para 644). It became increasingly felt that the common law doctrines were neither sufficiently clear nor sufficiently responsive to labour relations realities, and that special legislation would be more appropriate. In this regard the *Task Force on Labour Relations* (Queen's Printer, Ottawa, 1968), (*The Woods Report*) made a number of recommendations (see pp. 149-55; see also *Task Force on Labour Relations*, (Study No. 11),

at pp. 71-107, 137-57). Following the view expressed in *The Donovan Report*, *The Woods Report* concluded that in light of the public interest in industrial relations stability generally and the extensive control exerted by trade unions over the rights of individual members, a certain amount of public accountability and regulation of internal union affairs was necessary. At p. 149 the Report commented:

Today, many interests of trade unions are vested in the legal framework of collective bargaining, including monopoly bargaining rights. They can no longer claim the status of private associations whose internal affairs are solely their concern. They have become quasi-public bodies, if not public institutions, and the public has acquired an interest in their internal operations.

The report specifically recommended that although strike votes and ratification votes should not be mandatory, legislation should provide that when such votes are held they must be by a form of ballot that preserves secrecy. The specific observations and recommendations of the *Task Force Report* are instructive for what they reveal of the policy considerations underlying legislation like section 63(4) of the Act. They are more closely examined below.

31. A number of jurisdictions, including Canada, had already legislated in the area of union voting procedures before the McLellan and Donovan inquiries in the U.S. and the U.K. or the Woods Report in Canada. In New Zealand, for example, section 191(1) of *The Industrial Conciliation and Arbitration Act*, 1954, first enacted in 1947, provided: "... no ... strike shall take place until the question whether the strike shall take place has been submitted to a secret ballot of those members of the union who would become parties to the strike ...". That provision was coincident in time with *The Taft Hartley Act (Labour Management Relations Act — 1947)* in the U.S. which allows for a government conducted strike vote under certain conditions in strikes that are deemed to constitute a national emergency.

32. The first laws governing the conduct of strike votes in Canada and the U.S. appear to have come in the form of emergency wartime legislation during World War II. *Order in Council P.C. 7307* (in force from September 1941 to September 1944) authorized the Minister, if he deemed that a work stoppage would hinder war production, to order a supervised strike vote before a union could lawfully strike in any undertaking within the constitutional jurisdiction of the Parliament of Canada. In the U.S. *The Smith — Conally Act (War Labour Disputes Act)* (57 Stat 163, 78th Congress U.S.A.) enacted similar provisions and remained in force until December 28, 1945, (see, Anton, *Government Supervised Strike Votes*, (C.C.H. Canadian Ltd. pp. 10-130).

33. In Canada strike vote legislation was enacted in the post war period in two provinces. *The Alberta Labour Act*, 1945 provided that as precondition to a lawful strike a strike vote must first be conducted under the supervision of the Alberta Board of Industrial Relations. With certain amendments that requirement remains in effect today. (See, S.A. (1980), Chapter 72., s. 87 and s. 90. A similar provision was enacted in British Columbia. *The Industrial Conciliation and Arbitration Act*, S.B.C. 1947, c. 44, s. 75(1) required a secret ballot vote supervised by the B.C. Labour Relations Board as a precondition to a strike. In 1954 British Columbia's revised law, *The Labour Relations Act*, S.B.C. 1954, c. 17, s. 50(1) continued the requirement of a secret ballot vote before a strike, although under the new Act government supervision was only at the request of one of the parties. That provision remains in effect. (See, s. 81(1) of the Act.)

34. Section 63(4) of *The Ontario Labour Relations Act* as it presently exists originated as section 25(3) of *The Labour Relations Amendment Act*, 1960, S.O. 1960 c. 54. It then provided:

A strike vote taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

It was subsequently amended in 1970, after *The Woods Report*, to also require secret balloting in any vote to ratify a proposed collective agreement. Consistent with the recommendation of *The Woods Report* the section does not require a union to take a ratification vote.

35. The requirement of section 63(4) and its underlying purpose, is to be distinguished from the amendment of the Act in 1975 (S.O. 1975, c. 76, s. 7) adding section 34(d) whereby the Minister may, after the commencement of a strike or lock out order that a ratification vote be held where he is of the opinion that it is in the public interest to do so. It is also to be distinguished from the recent amendment (S.O. 1980, c. 34, s. 1) adding section 34e which gives an employer, other than in the construction industry, the right to have one supervised ratification vote among its employees on its last offer, before or after a strike has commenced, (see *Wilson Automotive*, [1980] OLRB Rep. Sept. 1337 and *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583.)

36. In Interpreting section 63(4) it is important to bear in mind its history and its limited purpose. There are a number of provisions in the Act respecting voting by employees, including representation votes in certifications, (ss. 7, 8), terminations (ss. 49, 51, 52), votes to resolve conflicting bargaining rights on the sale of a business (s. 55(8)) and the strike and ratification votes provided by sections 34(d) and 34(e). Section 63(4) is the only section in the Act in respect of votes conducted by a trade union. That reflects a clear legislative intention, consistent with the recommendations of the Royal Commissions reviewed above, to avoid undue interference in internal trade union matters.

37. Two predominant purposes appear to underlie the section: the promotion of industrial relations peace by reducing the likelihood of disputes and strikes that do not have the voluntary support of employees, and the protection of the ability of employees to exercise their privilege to vote on a strike or a contract ratification free from coercion or undue influence caused by any undue concern that their choice on a ballot will be known to others.

38. There has been less than full acceptance of the belief that secret ballot strike votes and ratification votes will reduce the incidence of strikes on the theory that rank and file employees are less prone to want a strike than their union leaders. The *Donovan Report* rejected that view in the face of empirical evidence, some of it emanating from the experience in Alberta and British Columbia, supporting the opposite conclusion. (see, the *Donovan Report*, para. 428) and see also Anton, *supra*, pp. 144-52; Bok and Dunlop *supra* at p. 78). There is considerable evidence to suggest that union leaders are generally more prone to seek stability and settlements and avoid confrontation than the rank and file employees that they represent. Partly on that basis the *Donovan Report*, like the *Woods Report* following it, declined to recommend that ratification votes and strike votes be mandatory. Both commissions accepted that to the extent that strike votes conduce to strike mandates, brinkmanship is promoted by mandatory strike vote legislation. In their view such legislation

too often forces a situation in which union negotiators have less freedom to move, thereby increasing rather than reducing the likelihood of disagreement between unions and management in bargaining. Under *The Labour Relations Act*, therefore, the decision whether a ratification vote will be held and the timing of such a vote is left entirely in the discretion of unions, save in the exceptional circumstances of sections 34d and 34e.

39. The prevailing purpose of section 63(4) must be seen as providing a minimum of protection to employees to insure that the voting rights which they exercise in ratification and strike votes are unfettered by coercion, intimidation and undue influence. Strike and ratification votes can, as in the instant case, be hotly contested within a bargaining unit. In light of the history canvassed above, there can be little doubt that section 63(4) was specifically designed to eliminate the mischief of voice votes or votes by an open show of hands at union meetings called to resolve issues of strike or ratification. While abuses were not frequent, (see, *Woods Report*, Study No. 11, *supra*, pp. 149-150; Anton *supra*, pp. 88-90), the section emphasizes the paramount interest in all cases of protecting the individual's right to vote secretly.

40. The wording of the section is deliberately general. Section 63(4) speaks of ballots, but does not require that they be cast at a meeting or that a ballot box be used. That is in keeping with the realities of collective bargaining. In some bargaining units ratification votes may have to be conducted over a period of days covering a number of locations or a wide area. Sometimes a union will require the expedient of mailed ballots. The omission from section 63(4) of any detailed rules on balloting procedures is a recognition that beyond eliminating the mischief described above, it is undesirable to unduly restrict a union's latitude to conduct its own affairs. It is also unrealistic to expect union meetings to be models of parliamentary democracy. The section is therefore limited to requiring a union to take adequate steps to shelter employees from the abuses of open voting.

41. In its present form section 63(4) is responsive to a number of the concerns expressed in the report of Woods Task Force which, at p. 153, made the following observations and recommendations:

There is no question that employers, unions, employees and the government as custodian of the public interest all have an interest in the issue of ratification votes. Nevertheless, in our view the question of ratification votes is primarily the business of unions. The problem presented by the tactical element is not one that is amenable to legislation. Were it so, we would have given more weight to the view that ratification votes should be banned. The element that is susceptible to control is the form that the ratification vote takes. The public interest in the system of collective bargaining justifies regulation to ensure a vote that fairly represents the judgment of the constituents. We therefore recommend that where a ratification vote is taken, it be by secret ballot and that the constituents have maximum access to the ballot.

To these ends we recommend that the ballot be taken at the entrance to the work place or work places or by mail, that steps be taken to ensure the secrecy of the ballot, and that the employer's right to put his views to the electorate be preserved. Knowledgeable mediators and conciliators can

play a useful function in advising the parties on the timing and form of ratification votes.

42. The Act leaves in the hands of a union the decision whether to hold a ratification vote internally. It does not establish any detailed rules to be followed on the taking of a vote save that it be by a form of secret ballot. As section 63(4) is framed, subject to the condition of secrecy, there is a necessary allowance for considerable flexibility in the time, place and method by which a ballot is taken. Section 63(4) is clearly worded to allow employees maximal access to the voting process. In our view it should not be construed as precluding multi-location balloting, balloting outside of a union meeting or balloting by mail or some other form of conveyance where that is appropriate. The word "manner" in the section is to be given a broad and liberal construction consistent with the intention of the section.

43. We turn to consider the facts of the instant complaint in light of the foregoing. When considering the "manner" of the ratification vote of February 22, 1981, the Board must look to all the circumstances of the vote, including the method, the locale and the personalities involved. The evidence establishes that the first step in the voting procedure was for the president of the local, himself an employee, to select three tellers or scrutineers from the body of the assembly. The evidence is unequivocal that he selected three rank and file employees known and trusted by those who would be voting. There is nothing in the evidence to suggest that any of the scrutineers was seen as being more or less allied to the union than the general body of employees nor to suggest that any of them would have been visibly identified with one side or the other of the issue being voted upon.

44. The complainant makes no issue of the integrity or of the conduct of the three scrutineers. In the Board's view that is significant. The Board's own policy and practice in representation votes recognizes that the personality of a scrutineer can have a bearing on a secret vote. When a representation vote is taken by the Board on an application for certification the employer and union are each entitled to name one scrutineer. Generally the Board prefers, absent compelling reasons to the contrary, that the scrutineers not be union officers or members of management, but rather that they be drawn from among the rank and file employees. (*Swingline of Canada Ltd.*, [1971] OLRB Rep. Nov. 701; *J. R. Menard Ltd.*, [1972] OLRB Rep. Oct. 915; *Scarborough Centenary Hospital Association*, [1979] OLRB Rep. Apr. 350; *Bermay Corporation Ltd.*, [1979] OLRB Rep. Sept. 848.) In the instant case the union's own internal procedure fully met the optimal standard which this Board prefers for the appointment of scrutineers in its own proceedings.

45. In our view, on the evidence before us, it would be overly technical to attach great weight to Mr. Finney's complaint about the arrangement of the voting tables in the Athenian Hall or to accept the objection of counsel for the company about the gauge of paper on which the ballots were printed. Those objections are not valid on the evidence before us.

46. In the instant case no employee has testified that his ballot was seen or that he felt that his ballot was being observed as he marked it. The three voting tables were placed at a reasonable distance and traffic in the hall was controlled and routed so that employees stood at a table alone, some twelve to fifteen feet from the nearest person, when they marked their ballot. There is no suggestion that each employee could not shield his ballot from possible view if he chose. The paper used for the ballot is a normal grade of commercial paper; no employee has objected that it was excessively thin or that a reasonable employee would feel inhibited in marking his ballot on that account.

47. Unions are associations of employees which vary greatly in size and sophistication. In the interpretation of section 63(4) the Board should strive to apply a standard which can be readily adhered to by any union, whether it be a large international or a small local. It would in our view depart from the intention of the section and take it far beyond the mischief against which it was aimed to required every trade union to operate as a model of electoral proficiency in the conduct of each internal ratification vote. There is obviously something of an honour system in any form of balloting. Voters can generally expect that other voters and voting officials will respect their privacy when a secret ballot vote is being conducted. There is no reason, absent compelling evidence to the contrary, why that presumption should be any less valid when a group of employees conduct a secret ballot through their union.

48. In giving content to the requirement for secrecy in section 63(4) the Board should respond to situations that give rise to a genuine basis for concern. By the same token it should not give undue attention to fanciful or technical objections unsupported by substantial evidence. In assessing the manner of balloting under section 63(4) the Board must therefore apply an objective standard. It must determine whether in all of the circumstances a reasonable employee would have any substantial reason to fear that his ballot would not remain secret.

49. In the instant case we are satisfied that neither the form of the ballot nor the physical layout of the voting tables would have inspired any meaningful fear or apprehension in the mind of any reasonable employee. In this regard it is noteworthy that when pressed in cross-examination Mr. Finney, whose evidence we judge to be candid and honest, himself declined to assert that he felt any actual concern or fear because of these factors, or indeed because of any other aspect of the manner in which the ballot was conducted.

50. We have had somewhat more concern for the fact that the ballots were placed on a table in front of the returning officer rather than into a box or some other container. Clearly it would have been better to have placed the marked ballots into an enclosed container as they were turned in by each voter. The issue is whether the fact that they were handled by Mr. Todd and placed on the table before him, first in a few rows, and then in a general pile, transgresses the requirements of section 63(4).

51. In considering this aspect of the case the Board places considerable weight on the unchallenged evidence that Mr. Todd enjoyed the respect and trust of the employees participating in the vote. It appears that like the other scrutineers he was selected because he enjoys a perceived neutrality and fairness in the minds of the employees in the bargaining unit. Mr. Finney called no evidence to contradict that view and indeed confirmed that it was no part of his case to raise any doubt about Mr. Todd's integrity or his trustworthiness in the minds of the employees.

52. After close examination of the evidence we are satisfied that this aspect of the evidence does not disclose a breach of section 63(4) of the Act. For any vote to proceed there must be some general presumption that a returning officer is to be trusted. That presumption is not weakened in this case since the evidence establishes a broad respect for Mr. Todd in the bargaining unit. An employee voting in the instant case must have at least as much confidence that the secrecy of his ballot would be respected as he would have if the ballot had been conducted by mail, a possibility clearly within the contemplation of section 63(4) of the Act. Even if balloting by mail is conducted by placing a marked ballot in a sealed plain envelope

which in turn is placed in a larger envelope for mailing, with blank envelopes being removed and placed unopened in a ballot box at the point of reception, there must be some allowance for trust in the officer or scrutineer who ultimately handles the mailed ballots.

53. The complainant argues that the mere possibility of identification offends the section. We cannot agree. To accept that argument is to reduce the section to an unduly narrow standard. Abuse is possible in any election no matter what precautions are taken. Having regard to the purpose of the section and the context in which it applies the more appropriate approach is to examine whether the manner in which a ballot is conducted gives rise to a perception among reasonable employees of a real likelihood that individual choices will be identified, so as to cause the kind of apprehension that can materially inhibit the expression of the true wishes of the individuals in the bargaining unit. That question can only be answered in individual cases by closely examining all of the circumstances.

54. We are satisfied that in this case the evidence does not disclose a violation of section 63(4) of the Act. The section requires a secret ballot vote. That is what the union conducted, consistent with requirements of its own constitution. Specially printed ballots were used. Instructions were given that they should be folded, obviously for the purpose of protecting secrecy. Steps were taken to insure voters a reasonable measure of privacy as they marked their ballots. The ballots were handed out, collected and counted exclusively by three employees whose trust and integrity are unquestioned. From the time the vote was called until the result of the vote was certified in writing by the scrutineers no union officer had any contact with the ballots. Save in the instance of one employee who made a deliberate show of spoiling his ballot, there is no evidence to suggest that the choice on any employee's ballot was seen or that there was any reasonable likelihood that it would be seen. The fact that a less honourable person than Mr. Todd could, by some deliberate act of bad faith, has violated his trust and identified the choice of some employees, does not invalidate what in fact occurred.

55. Counsel for the company stressed that the closeness of the vote makes this a hard case. Clearly the closeness of a given vote cannot affect our interpretation of section 63(4) and the standard to be applied. Being satisfied that the standard required of section 63(4) has been met, all that we can conclude from the evidence of the result of the vote is that on the issue of ratification the employees were closely divided. We agree with counsel for the company that the outcome of a vote in a given complaint under section 63(4) might have some bearing on the exercise of the Board's remedial discretion under section 79 of the Act. That discretion comes into play however, only once a violation of the section has been established. In this case it has not.

56. For the foregoing reasons the complaint is dismissed.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. I disagree and would have found for the complainant. From the facts as recited in the majority award it is apparent that in the absence of a ballot box, as was used in the vote of February 1, 1981, the February 22nd vote *was* conducted "in such a manner that a person expressing his choice" *could have been* "identified with the choice expressed."

2. It is one thing for the Board to disregard the exhibitionist who chooses to make a display of destroying or defacing a ballot, but, in my view, the wording of section 63(4) does

not permit us to ignore the clear wording on the strength of the good intentions of the union or the good reputation of the poll clerk.

3. The Act does not require the union to take such a vote nor, in the event the union decides to conduct such votes, does the Act stipulate how the vote shall be conducted. Quite properly, however, the Act does stipulate that ratification votes shall be conducted in such a manner that no one individual should be able to determine the choice made by any individual voter. In the instant case this onus would have been met had a ballot box been employed on February 22nd as was the case on February 1st. While at worst this error of omission may have been an oversight on the part of the union I take the view that the Board should not turn a blind eye even to a technical error when it impinges on a matter of such vital concern to the lives of the employees affected.

4. If the Board is drawing comparisons with federal or provincial elections then, if only for the sake of completeness, it should have noted that were a poll clerk to be so injudicious as to unfold the ballot (after detaching the numbered stub) a scrutineer for one of the parties would be entitled to close the poll immediately.

5. With respect to the views expressed by *The Woods Report* (cited at para 30), I think it important to note that none of the major employer submissions to the Task Force called for mandatory ratification votes. They did however argue in the strongest terms that where unions decided to conduct such votes the preservation of secrecy was imperative. They noted that unlike municipal, provincial or federal governments, which are obliged by statute to such a renewal of their mandates at periodic intervals, unions retain their monopoly bargaining rights indefinitely unless their constituents are moved to organize a plebiscite within the limitations of the Act.

6. In the interests of stability in labour management relations employers would not be disposed to object to this differentiation between representational government and the representation (i.e. bargaining) rights of unions. At the same time this very difference is what makes it incumbent upon unions to be diligent in ensuring the secrecy of balloting in their voting procedures. From this perspective, to have expected that a ballot box would have been provided on February 22nd, as was the case on February 1st, does not seem to be an onerous requirement nor would a finding for the complainant represent an undue intrusion into the internal affairs of the union by this Board.

7. If this decision stands for the proposition that something akin to a ballot box is not a minimal requirement of meeting the implied provisions of section 63(4), I would take this section of the Act to be meaningless.

2629-80-R;2630-80-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC: Applicant, v. **Royal Hotel (Sault Ste. Marie) Limited**, Respondent, v. Hotel and Restaurant Employees' and Bartenders' International Union and its Local 412, Intervener.

Representation Vote – Employees intimidated by another employee at private social gathering – Whether “campaigning” in contravention of the silent period

BEFORE: D. E. Franks, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

APPEARANCES: *B. Fishbein and R. McArthur for the applicant; Robert Macpherson for the respondent; Raj Anand, Thomas L. Rees and Tina McGonegal for the intervener.*

DECISION OF THE BOARD; August 10, 1981

1. By a decision dated May 29, 1981, another panel of this Board directed the taking of a representation vote in which certain of the employees of the respondent were given a choice between the applicant and the intervener with respect to who should represent the employees in the bargaining unit. That vote was taken on June 29, 1981. The ballots were counted with the result that of the 42 ballots cast, 25 of the 42 ballots were cast in favour of the applicant and the remaining 17 cast in favour of the intervener. The last day for the filing of statements of objections to the conduct of the representation vote was set by the rules as July 7, 1981.

2. On July 7th, counsel for the intervener trade union wrote to the Board requesting that the results of the representation vote be set aside and that a new vote be ordered. The basis of this request was two fold, one alleging a violation of the silent period directed by the Registrar, the other alleging the dissemination of misleading information. At the hearing in this matter, the intervener abandoned this second position and it is only necessary for us to deal with the matter of the violation of the silent period.

3. The relevant portion of the allegation contained in the July 7th letter by the intervener trade union reads as follows:

“Violation of the ‘Silent Period’

On or about Saturday, June 27 and Sunday, June 28, 1981, Ms. Linda Taillefer, an employee of the respondent and a representative of the applicant who acted as scrutineer in the election, engaged in campaigning at a party at the home of one Stephen Yeung, inter alia, by attempting to persuade Ms. Laura McLelland and Ms. Karen Morettin to vote for the applicant.”

Subsequent to the intervener's letter of July 7, 1981, counsel for the applicant, pursuant to section 47 of the Board's Rules of Procedure, requested particulars with respect to the incident referred to above. Particulars were given by the intervener in a letter dated July 22nd and in a letter dated July 29th from counsel for the intervener. This letter reads as follows:

“In further response to Mr. Fishbein's letter of July 16, 1981, and without in any way conceding the validity of his request for particulars contained

in that letter, I am writing to supplement and clarify the first allegation made on behalf of the intervener in my letter of July 7, 1981, to the Board.

At the party at the home of Stephen Yeung on the evening of Saturday, June 27 and the early morning of Sunday, June 28, within the 72 hour period prior to the date of the representation vote held on June 29, Ms. Taillefer, an employee of the respondent and an organizer for the applicant, engaged in intimidation and attempts at persuasion of Ms. Laura McLelland, an employee of the respondent, in the presence of Ms. Karen Morettin.

Ms. Taillefer informed Ms. McLelland that she knew her to be a supporter of the intervener, and that if she attempted to vote, Ms. Taillefer would challenge her vote, and that Ms. McLelland's vote would no longer be secret. Ms. Taillefer also engaged in discussion with Ms. McLelland of the relative merits of the two unions as bargaining agent for the employees of the respondent. The effect of Ms. Taillefer's representations was that Ms. McLelland left the room to avoid Ms. Taillefer's harassment, and did not participate in the representation vote because of the threats made by Ms. Taillefer."

4. Counsel for the applicant at the hearing in this matter took strenuous objection to the fact that the letter from the intervener dated July 29th had substantially expanded upon the grounds listed in the letter of July 7, 1981. In the course of dealing with a preliminary motion by counsel for the applicant, counsel for the intervener acknowledged that his letter of July 29th could not be interpreted as expanding upon the allegation in the earlier letter, for instance, to the effect that his letter of July 29th alleged a violation of section 61 of the Act.

5. We are completely in accord with this view taken by counsel for the intervener. At this late date counsel's letter of July 29th cannot be taken to raise on a new source of complaint concerning the representation vote conducted by the Board. The only affect that can be given to the letter of July 29th is to expand upon the conduct of Ms. Taillefer as an attempt to persuade Ms. McLelland and possibly Ms. Morettin during a social event which occurred during the silent period.

6. This in turn led counsel for the applicant to make a preliminary motion at the Board's hearing to the effect that the conduct outlined in the letter of July 7th and as noted above expanded by the letter of July 29th did not give rise to the request which the intervener made in its letter of July 29th. That is, even if one were to allow as a fact in this matter, the conduct alleged in the letter of July 29th, that conduct does not of itself amount to a breach of the silent period imposed by the Registrar or this Board.

7. After hearing the representations of the parties in this matter, the Board at the hearing acceded to the request of the applicant and denied the request of the intervener to inquire into the alleged breach of the silent period. On the basis of the facts alleged in the intervener's letter of July 7, 1981, and other facts admitted to the Board on consideration of this preliminary motion, we cannot find that there has been a breach of the silent period as directed by the Registrar. To put the intervener's case in its very best, we have a situation which is clearly a social event not financed or participated in by the applicant trade union. In the

course of that social event, Ms. Taillefer, who is an employee in the bargaining unit, discussed with two other employees in the bargaining unit, the vote which was to take place on the following Monday morning. Ms. Taillefer is not a paid union organizer on behalf of the applicant, but like Ms. McLelland and Ms. Morettin is an employee in the bargaining unit. We find it difficult to characterize a conversation between three employees in the bargaining unit on the Saturday evening prior to a representation vote as within the meaning of the term campaigning which is prohibited by order of the Registrar in a representation vote. Such an event occurring at a completely unconnected social event cannot be viewed as an organized attempt by a party to a representation vote to convince employees to vote in a certain way at that representation vote. Indeed, the very meaning of the term "campaign" connotes the notion of an organized attempt to achieve a particular end. Clearly, the events alleged by the intervener cannot be construed as an *organized* attempt to persuade other employees. In this regard, reference should be had to the Oxford Dictionary which sets out the following meaning of the word "campaign".

"1. Series of military operations in a definite theatre or with one objective or from taking the field to a temporary or final cessation of hostilities (*the Burma, Moscow, 1704, -*); organized course of action, esp. (Pol.) attempt to rouse public opinion for or against a policy, 2. v.i. Serve on or conduct a -; hence -er n. (old-er, person practised in adapting himself to circumstances)."

In view of the foregoing we are of the view that the conduct of Ms. Taillefer at the party on Saturday, June 27th cannot be construed as campaigning, and thus a violation of the Registrar's direction against campaigning during the silent period. Therefore, at the conclusion of the hearing, the Board dismissed the request by the intervener to inquire into the events of Saturday evening, June 27th as alleged in the intervener's letter of July 7, 1981.

8. Accordingly, on the taking of the representation vote directed by the Board more than fifty per cent of the ballots cast were cast in favour of the applicant.

9. A certificate will issue to the applicant.

10. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

0646-81-R Printing Specialities and Paper Products Union Local 540, Subordinate to International Printing and Graphic Communications Union, Applicant, v. **The Spectator, A Division of Southam Inc.**, Respondent.

Certification – Bargaining Unit – Applicant seeking unit restricted to drivers and driver's helpers – Relying on Board past practice in printing industry – Board signalling that it may not in future make exception in printing industry to give departmental non-craft units

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and D. B. Archer.

APPEARANCES: *C. M. Mitchell and R. Tozzi for the applicant; M. Patrick Moran, Thomas McCarthy, Barrie Williams and Jack Nelson for the respondent.*

DECISION OF THE BOARD; August 19, 1981

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*.
3. The parties are disagreed as to the description of the bargaining unit. The applicant union seeks to represent a unit of all regular part-time delivery drivers and helpers, and Saturday part-time delivery drivers and helpers, regularly employed for not more than twenty-four hours per week and students employed in the same classifications during the school vacation period at the respondent's operations at 44 Frid Street in Hamilton.
4. Counsel for the respondent submits that the bargaining unit should include all part-time employees of the respondent in the composing room, mail room and delivery area, save and except dispatch department employees, paper balers, street sales employees, clerical help, janitors and office boy. Counsel for the respondent concedes that in the past it has been the Board's practice to find appropriate departmental bargaining units such as the one proposed by the applicant. He submits, however, that a more comprehensive unit is appropriate in the instant case.
5. It appears that there is a bargaining unit of full-time employees which includes the composing room, mail room and delivery area. That bargaining unit was fashioned by the agreement of the parties and not by a certificate of this Board. Approximately a year ago the applicant's sister Local 669 was certified, by the agreement of the parties, as bargaining agent for all full-time employees of the respondent in its circulation department (Board File No. 0103-80-R, May 26, 1980). By the agreement of the parties the employees in that bargaining unit were merged into a larger bargaining unit also composed of full-time composing room and mail room employees, the latter two groups having also been the subject of prior separate certificates issued to Local 669.
6. The respondent submits that in these circumstances the appropriate unit for part-time employees should reflect the unit that has been established by the agreement of the parties for the full-time employees. Counsel for the union responds that the Board has a long-standing

practice of granting certificates in respect of departmental groups in the newspaper and printing industry. It emphasizes the fact that a year ago the respondent agreed to a departmental bargaining unit for circulation department employees working full-time. Counsel for the union also stresses the reliance of the union on previous Board policy as the basis for its organizational campaign, implying that it would be unfair to the applicant to depart from established Board policy.

7. As a general practice the Board does not grant certification on a departmental basis. For historical reasons exceptions were made in the newspaper and printing industry. Those industries were traditionally organized by craft unions at a time, long pre-dating the existence of this Board, when the printing trades were distinguished by specialized skills that gave rise to clear distinctions along craft lines. (See, Zerger *The Development of Collective Bargaining in the Toronto Printing Industry in the 19th Century* (1975) 30 IR/RI 83. From its earliest days the Board granted certificates in the newspaper industries reflecting the traditional craft designations. (See, e.g. *The Ottawa Citizen*, [1944] OLRB Rep. Aug.; *The Star Publishing Company of Windsor, Limited*, (1945) CLLC ¶10,424. The traditional preponderance of craft units in the newspaper industry tended to produce more fragmented bargaining structures than would be encountered in other industrial settings. That may explain why, over the years, the Board often acceded to the agreement of the parties to departmental units of employees who did not possess craft skills. Generally in an industrial setting the Board would, apart from any special craft units, contemplate a breakdown of employees for collective bargaining purposes into office and clerical employees on the one hand and production employees on the other. When a plant is substantially organized along those lines any union seeking to obtain certification for a departmental unit is normally required to take a tag end unit of all unorganized employees. The obvious reason is to avoid undue fragmentation in collective bargaining.

8. In the instant case the parties were unable to refer the Board to any precedent decisions in which the practice of permitting departmental bargaining units in the newspaper industry was fully explained. A review of the Board's prior decisions suggests that the practice has evolved more as a matter of deferring to the agreement of the parties in the industry, an obviously critical consideration, rather than by the application of normative collective bargaining principles in disputed cases. If in the past the Board has acceded to agreements establishing the non-craft departmental units in the newspaper industry, it has not done so without some guarded concern. In the *St. Catharines Standard Limited*, [1975] OLRB Rep. July 601, the Board granted certification for all employees in the classified advertising department of the employer newspaper. In so doing it commented, at page 603, as follows:

In accepting the agreement of the parties, we wish to state that although the Board does not normally grant departmental units, such units have been recognized as appropriate in the newspaper publishing industry; see, for example, *Telegram Publishing Company Limited*, 59 CLLC ¶ 18, 126; *Globe & Mail Limited*, 63 CLLC ¶16,290, where Circulation Department units were held to be appropriate. Moreover, it is presumed that the parties themselves know how their collective bargaining relationship can best be structured. Therefore, unless the agreed unit is patently irrational or unworkable — for example, if the grouping has no functional or organizational coherence, or if it excludes persons without convincing justification — the Board will normally accede to the wishes of the parties.

9. The foregoing passage indicates the Board's concern for the excessive fragmentation of bargaining units while recognizing the countervailing value of giving the greatest weight to the agreement of the parties in the structuring of bargaining units. Implicit in that statement, however, is an indication that where there is no agreement between the parties on the structure of a bargaining unit in the newspaper industry the Board will not hesitate to apply established general principles respecting community of interest in fashioning appropriate bargaining units. This is the first application in the newspaper industry which we are aware in which the parties have not been agreed on the designation of the bargaining unit. To that extent the Board is compelled to address the question of whether non-craft departmental units should be the presumed rule in the newspaper and printing industry or whether collective bargaining could be appropriately grounded on a more comprehensive basis.

10. In the past twenty years the newspaper industry has seen some fast moving and dramatic technological change in its methods of production. (See, generally Baker, *Printers and Technology* (1957, Columbia University Press, New York); Kelber and Schlesinger *Union Printers and Controlled Automation* (The Free Press 1967, New York); Rogers and Friedman *Printers Face Automation* (Lexington Books, 1980, Lexington Mass.)) The movement of newspaper printing processes from hot lead to cold metal and to still more modern computerized word processing and photo-printing equipment has already spawned complex jurisdictional disputes at a number of Canadian newspapers (including LaPresse, The Pacific Press and The Toronto Star; see, the *Toronto Star Newspapers Limited*, [1979] OLRB Rep. may 451; *Toronto Star Newspapers Limited*, [1980] Rep. Apr. 565 at 566). Labour boards have been forced to become increasingly cognizant of the collective bargaining ramifications of these developments in the newspaper and printing industry and have been required to fashion decisions responsive to the emerging reality.

11. In a recent decision the National Labour Relations Board had occasion to consider the bargaining unit appropriate in a newspaper transformed by recent technological change. (*Leaf-Chronical Company*, (1979) 244 NLRB 1104; 102 LRRM 1306). In that case the employer maintained that the Board's traditional practice of granting departmental units should be followed and that the composing room, camera room, press room and mailing room should be separated into individual bargaining units. It also requested a separate multi-location editorial or news department bargaining unit. After closely examining the facts the NLRB noted that there had been a substantial blurring of craft lines in the newspaper's operations. It noted that the only skill required in the composing room was typing and that there were no skill or experience prerequisites for employment in any other of the production departments. The Board also remarked that the merger of the Mailer's Union with the Typographers (I.T.U.) further blurred traditional craft lines. Applying normal considerations of community of interest the Board concluded that two bargaining units were appropriate, one being a comprehensive unit including all mechanical department employees of the newspaper and the second being composed of all newsroom and editorial employees.

12. We see no reason why, in a similar case, this Board should arrive at any different conclusion. When the employees of a newspaper or printing shop perform discernable craft skills and an established craft union applies to represent them in collective bargaining the overriding policy of the Act, expressed in section 6(2), is that the value of special representation overrides the disutility of fragmentation. On the other hand, where employees do not exercise technical skills or perform craft work which meaningfully distinguishes them from other employees there should be no presumption in favour of fragmentation. In future

applications in the newspaper and printing industry, therefore, where it does not appear on the evidence that the preconditions to the certification of a craft unit are made out the Board will be open to submissions for the structuring of bargaining units on the basis of normal considerations of community of interest. There should no longer be any presumption that non-craft bargaining units will be structured by department; without limiting the direction in which the Board may wish to take in any given case we see no reason why in the newspaper and printing industry, apart from the establishment of legitimate craft units, the representation of employees for collective bargaining purposes should be any less comprehensive than in other industries. Where the evidence discloses a separate community of interest among all office and clerical employees, all mechanical production employees and all editorial or newsroom employees bargaining units should be fashioned accordingly.

13. We turn to the bargaining unit in the instant case. The Board does not accept the submission of counsel for the respondent that a three department unit is necessarily appropriate solely on the basis that a similar unit has been established by agreement in respect of a portion of the full-time employees. The mere fact that a sister local of the union has agreed to a more comprehensive unit should not restrict the ability of the applicant to request a designation that has previously been found to be appropriate in a number of previous Board decisions. In light of the comments of the Board in the *St. Catharines Standard Limited*, (supra) we are also of the opinion that although it is appropriate to signal the new direction that the Board will take for non-craft bargaining units in the future, it would be unfair to dismiss this application. In the circumstances of this case, and particularly given the previous pattern of organization in the respondent's plant, we are satisfied that the bargaining unit requested by the applicant is sufficiently appropriate for the purposes of certification.

14. The Board therefore finds that all employees in the circulation department of the respondent at 44 Frid Street, Hamilton, regularly employed for not more than twenty-four hours per week and students employed in the circulation department during the school vacation period, save and except supervisors, and those employees covered by an existing collective agreement between Graphic Arts Union, Local 669 subordinate to International Printing and Craft Communications Union, and the respondent, constitute a unit appropriate for collective bargaining.

15. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on July 2, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. A certificate will issue to the applicant.

0300-81-R Thomas Pearson, Applicant, v. Christian Labour Association of Canada, Respondent, v. Epworth Glass Limited known as Upper Canada Glass, Intervener

Petition – Termination – Gaps in evidence as to origination and circulation of termination petition – Whether Board satisfied as to voluntariness

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members M. Eayrs and H. Simon.

APPEARANCES: *William H. Fysh, Thomas Pearson and Fred Connell for the applicant; Ed Vanderkloet and Ron Rupke for the respondent; James H. Epworth and Howard J. Epworth for the intervener.*

DECISION OF THE BOARD; August 11, 1981

1. This is a timely application filed under section 49 of *The Labour Relations Act* for a declaration that the Christian Labour Association of Canada (“the union”) no longer represents the employees of Epworth Glass Limited known as Upper Canada Glass (“the employer”) in a bargaining unit described in the collective agreement between the employer and the union which expired March 31st, 1981 and for which the union is currently the bargaining agent.

2. Since this is an application in respect of employees in a bargaining unit defined in a collective agreement, it is an application which falls under subsection 2 of section 49. In such cases, subsection 3 provides that:

“... the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing...that they no longer wish to be represented by the trade union,...”.

Therefore, if not less than 45 per cent of the employees in the bargaining unit signify voluntarily, in writing, that they no longer wish to be represented by the trade union, subsection 3 mandates the Board to satisfy itself by means of a representation vote whether the majority of the employees desire that the right of the trade union to bargain on their behalf be terminated. The petition filed in support of this application contains sufficient signatures to demonstrate, *prima facie*, that not less than forty-five per cent of the employer’s employees in the bargaining unit desire that the right of the trade union to bargain on their behalf be terminated. What remains for the Board to determine, therefore, is whether the petition filed with the application is a voluntary expression of that desire.

3. The applicant, Thomas Pearson, testified at the hearing into the application as to the circumstances surrounding the origin, preparation, circulation and filing with the Board of the petition and the application. According to him the employees had talked about the possibility of ending the union’s representation of them for approximately a year before deciding to do something. As a result of their decision, a document addressed in the following manner was sent to the union:

"Christian Labour Assoc. of Canada,
821 Albion Rd.,
Rexdale, Ontario.
M9V 1A3

Dear Sirs:

We the undersigned have unanimously agreed to terminate all commitments and benefits such as Union Dues and memberships with the Christian Labour Association of Canada on this 6th Day of April 1981."

The document bears the typewritten names of all of the persons whose names appear on the schedules filed by the employer in connection with this application and purports to be signed by them. A copy of the document also was given to the employer. For ease of reference, this document will be referred to as petition #1. Four days later, five of the same persons whose names appear on petition #1 signed a second document bearing the following headnote:

"We, the undersigned hereby unanimously and voluntarily signify that we no longer wish to be represented by the Christian Labour Association of Canada".

The applicant is relying on this document to establish that his application has the requisite support of employees in the bargaining unit.

4. According to Pearson, after the employees had decided that they wanted to have the union's bargaining rights terminated, they spoke to the employer to see if such a move would "bother his business". They were told that whatever they did was totally up to them. Next the employees sought the advice of a fellow employee. He was the employee in the bargaining unit having the most service with the employer. When all of the employees would go on the same job outside of the shop, he was the employee who would be in charge of all the others. In this respect, he seems to have enjoyed no higher status than other employees since, whenever two or more employees went on a job, the most senior employee on the crew would be in charge of the other employee or employees. Nonetheless, Pearson stated unequivocally that there was no question in the minds of all of the employees that the employer is the senior man and the foremen. It was following discussion with this employee that petition #1 emerged. Pearson said that he first saw his document in the hands of the employee when he brought it into work the day after the employees had spoken to him. It was typed in the form referred to above. Pearson was not present when this document was prepared and did not have anything to do with obtaining the signatures, although he signed it himself and was present when two other persons signed it.

5. After petition #1 was served on the union, Pearson stated that the employees concluded that terminating the bargaining rights of the union was more complicated than they had foreseen, therefore they obtained legal advice. He had nothing to do with the initial selection of the firm of solicitors which was engaged to represent the employees and he could only tell the Board that he thought it was the same employee to whom the employees had gone for advice who did so. The firm selected is the same one that acts for the employer. He believes that petition #2 was prepared by legal counsel. Pearson first saw it after returning to the shop from a job when it was pointed out to him by the shop superintendent who commented to the

effect that there was the new form. It was on the front cutting table where Pearson usually picked up job messages and where the superintendent usually performed his shop work. Pearson took the petition, called two other employees and went to the rear of the shop where all three of them signed it. The other two signatures were obtained away from the employer's premises. The only person who did not sign petition #2 was the employee who had obtained the signatures on petition #1. He had not been at work that day, although he attended later at the solicitor's office where Pearson took petition #2. Pearson turned the petition over to the solicitor who prepared the application and had Pearson sign it. Both documents were left with counsel for filing with the Board. Shortly thereafter Ron Rupke, an Ontario representative of the union, received by registered mail a copy of the application and both petitions. While it is not clear from the evidence whether it was sent to him by the employer or the employer's solicitor, there can be no doubt that it was sent by one or the other.

6. These are the facts from which the Board must satisfy itself whether the employees have signified voluntarily that they no longer wish to be represented by the union. The nature of this issue of voluntariness is aptly described in the following terms in the Board's decision in *Royal Hydrofoil Cruises (Canada) Limited*, Board file No. 0795-80-R, unreported, which issued November 12, 1980:

11. "... the Board's concern in any representation application is in ascertaining the true wishes of the employees. In assessing an employees' statement of desire the issue is simply one of *voluntariness*, whether in the context of the Board exercising its discretion under section 7 of the Act, or of an application for termination under section 49, where the word "voluntarily" is specifically used. Gaps in the evidence, or the involvement of management in a petition (whatever else may be its consequences) are relevant to the Board's inquiry in a representation context to the extent that they affect the Board's determination on the fundamental issue of voluntariness (see *Fuller's Restaurant*, Board File No. 0150-79-R). Where management *has* been involved, of course, the Board has historically been prepared to draw liberal inferences that that fact may have been known generally to employees. It is, however, because the sole issue is voluntariness that the Board finds itself constrained to disregard an employee petition not only when it concludes that the voluntariness of employee acts may have been affected by the *actual* involvement of management, but where it may have been affected by no more than a *perceived* involvement (see, e.g., *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813). It is the reasonable perception of the employees that the Board must assess.

12. In a "petition" case, therefore, the Board requires sufficient evidence before it to enable it to make this assessment. Hence the Board's Rules, in section 48, contain the following caution:

'48.-(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.'

and this is reflected in the *Notice to Employees* (Form 5) as well. These are not technical standards of evidence; they simply reflect the reality that when all of the evidence is in, the Board has to be satisfied that any employee statement being relied upon is voluntary. In this regard, the Board in *Fuller's Restaurant, supra*, had this to say:

'18. The Board has held that the requirement for first-hand evidence of the circumstances surrounding the origination, preparation and circulation of a statement of desire places an onus on those wishing to establish the voluntariness of the statement to call evidence of how each of the signatures was obtained as well as evidence detailing the physical preparation and the actual delivery of the document to the Board'. (See *Formosa Spring Brewery*, [1974] OLRB Rep. Oct. 696.) Because the onus is on the petitioners to satisfy the Board as to the voluntariness of the statement, and because the signing of a statement against the union after signing a card in support represents a sudden change of heart, any gap in the evidence from preparation to delivery to the Board may prove fatal in any given case. It is for this reason that the Board has put petitioners on notice as to the extent of the evidence which may be required. A gap in the evidence relating to the delivery of the statement to the Board when considered in conjunction with other gaps in the evidence relating to custody of the document or in conjunction with evidence suggesting company involvement may cause the Board to find that it has not been satisfied as to the voluntariness of the statement....'

7. That passage, including its quotation of paragraph 18 of the Board's decision in *Fuller's Restaurant* [1980] OLRB Rep. Sept. 1289, illustrates several important considerations for the Board in assessing whether petition #2 expresses the voluntary wishes of the employees:

- (a) The Board requires sufficient first-hand evidence of the circumstances surrounding the origin, preparation and circulation of petition #2 to satisfy itself that the petition is voluntary.
- (b) This requirement for first-hand evidence places a responsibility on the applicant Pearson and the employees supporting the application to establish the voluntariness of petition #2.
- (c) Any gaps in the evidence about the origin, preparation and circulation of petition or evidence of actual or perceived employer involvement with the petition are relevant matters for the Board to

consider to the extent that they affect the Board's determination of the issue of voluntariness.

The evidence before the Board about petition #2 contains significant gaps. Pearson could not tell the Board from first-hand knowledge who had prepared it and how it had found its way to the front cutting table for its presence to be pointed out by the shop superintendent with the comment to the effect that "there is the new form". Furthermore, petition #2 emerged only four days after petition #1 and was closely related to it. The Board, in the past, has found a second petition not to be voluntary when it was dependent upon and inter-related with an earlier one which the Board had found to be tainted by employer influence. *General Crane Industries Limited*, [1974] OLRB Rep. Oct. 662. In such circumstances, the Board has held that the circumstances surrounding the first petition to be relevant to the origin and preparation of the second one and the manner in which each signature on it was obtained. Pearson was unable to testify from first-hand knowledge about the origin, preparation and the manner in which the signatures were obtained on petition #1, except for the fact that he signed it himself and saw two other employees sign it. It is obvious, therefore, that the Board has no evidence before it as to the physical preparation of petition #1, the possession of it prior to when Pearson first saw it or about how three of the six signatures were obtained. Thus there is an insufficiency of evidence from which the Board can satisfy itself that petition #1 was a voluntary expression of the wishes of the employees who signed it. Since it must be seen to have spawned petition #2, it casts that petition in a similar state of uncertainty.

8. In addition to these gaps in the evidence, there are the facts relating to the other circumstances about the origin, circulation and filing with the Board of both petitions. Petition #1 was circulated by an employee who, according to Pearson, is seen by him and the other employees as the foreman. This is not to say that he performs managerial functions. The fact that he is in the bargaining unit at least establishes that there has been no successful claim that he exercises managerial function within the meaning of the Act. What it does infer, however, is that the employees see his relationship with the employer as aligning him more closely with the employer's interests than is the case with the other employees. Since this employee did not appear to give evidence about his role in connection with either petition, the Board did not have the opportunity to assess whether his relationship with the employer had any influence on the origin of either petition or on the manner in which they were signed. This is the employee whom Pearson thought had picked the same firm of solicitors to advise the employees as acts for the employer. Obviously Pearson is free to decide whether he wishes to be represented by counsel and who that counsel will be if he does. The only interest which the Board might have is whether the selection is indicative of employer influence or interference with the origin, preparation and circulation of the petition. The selection may have been made without any knowledge that the firm acted for the employer, or there may have been any of several reasons for purposely choosing to be represented by the same firm, none of which had anything to do with employer involvement. The fact is that Pearson did not choose counsel and there is no evidence before the Board which explains the coincidence so that the Board might satisfy itself that the employer was not involved. Nor is there any evidence which provides an explanation of why either the employer or its solicitor found a need to send a copy of this application and each petition to the union.

9. The circumstances referred to in paragraph 8 may be suggestive of employer involvement with the petitions, but they are not sufficient support from which to draw the inference that the employer was involved. When, however, these circumstances are viewed in

conjunction with the gaps in the evidence concerning both petitions significant uncertainty remains about the circumstances surrounding the origin, preparation, circulation and filing with the Board of petition #2. In these circumstances, the Board cannot be satisfied that the employer was neither involved with the petitions nor perceived by the employees to have been involved. Nor can the Board be satisfied, in these same circumstances, that the employees who signed petition #2 did so voluntarily and not because it was the wish of the employer or because they were concerned that the employer would become aware of who had signed it. The Board concludes, therefore, that petition #2 does not represent the voluntary wishes of the employees who signed it.

10. Accordingly, the Board finds that less than forty-five per cent of the employees of Epworth Glass Limited known as Upper Canada Glass in the bargaining unit at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the Christian Labour Association of Canada on May 28th, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the union under section 49(3) of the Act.

11. The application is dismissed.

1940-80-R Arthur Wilkinson, Applicant, v. United Food & Commercial Workers International Union Local 633 AFL-CIO-CLC, Respondent, v. Vaunclair Meats Limited, Intervener

Sale of a Business – Termination – Timeliness – Employer selling business – Union giving notice to bargain under section 55(3) – Termination application under section 49 filed after notice given – Whether timely

BEFORE: M. G. Picher, Vice-Chairman and Board Members W. H. Wightman and D. B. Archer.

APPEARANCES: *Arthur Wilkinson on his own behalf; D. J. Wray and J. DiNardo for the respondent; W. Herridge and J. Hurlbut for the intervener.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER D. B. ARCHER; August 5, 1981

1. The applicant has applied to the Board under section 49 of the Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent. The respondent submits that the application is untimely and must therefore be dismissed.

2. The facts are not in dispute. Vaunclair Meats Limited is the successor employer, having been found by the Board to be the transferee of a business from Vaunclair Purveyors

Company Limited. (Reported in [1981] OLRB Rep. May 581). The respondent union had a collective agreement with the predecessor employer which expired on October 22, 1980. Prior to the transfer of the business, on August 22, 1980, it gave the predecessor employer timely notice to bargain for renewal of the agreement. After the transfer of the business the union gave a further notice to bargain to the present employer, the intervener in this case, on November 20, 1980. This application to terminate the union's bargaining rights was filed on November 26, 1980.

3. The union submits that because its notice to the intervener was a notice with the meaning of section 55(3) the effect of section 55(10) is to render untimely the application for termination which was filed subsequently. The relevant sections are as follows:

Section 55(3)

Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to make a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 45, as the case requires.

Section 55(10)

For the purposes of section 5, 49, 51, 53, and 112, a notice given by a trade union or council of trade unions under subsection 3 or a declaration made by the Board under subsection 5 has the same effect as a certification under section 7.

Section 49(1)

If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

Counsel for the intervener submits that section 55(10) was intended to apply only in a situation where the sale of a business occurs during the course of bargaining for a first agreement, and not, as in this case, where the renewal of a prior collective agreement is being negotiated. He submits that to apply the section to a renewal situation would allow a union the possibility of completely foreclosing any open period by giving a successor employer notice to bargain under section 55(3) before the commencement of the open period under the collective agreement.

4. We cannot agree that the application is timely. The facts of this case are on all fours

with those in *Independent Paper Convertors Inc.* [1979] OLRB Rep. Mar. 207. In that case section 55(3) notice was given after the transfer of a business and before an application for termination was filed. In dismissing the application as untimely the Board commented at p. 209-10:

The question as to when an application can be made to terminate a union's bargaining rights is an important one, and reflects two competing industrial relations concerns. One of these concerns is that employees not be straddled with a trade union which they no longer desire to have represent them. The other concern is that a trade union be given a reasonable opportunity to negotiate a collective agreement, and particularly a first collective agreement, free from the disruptive effects of a termination application. In our view the detailed provisions set forth in the Act concerning the timeliness of termination applications reflects an attempt on the part of the Legislature to strike a balance between these two concerns. This being the case, we are of the view that it would be improper for this Board not to give effect to the time limits specifically provided for in the Act. . . .

Section 55(10) provides that notice given under section 55(3) has the same effect as a certification for the purposes of section 49. Section 49, in turn, provides that no termination application can be made until after a year from a union's certification. It follows, in our view, that no termination application can be made within one year of the giving of notice to bargain to a successor employer pursuant to section 55(3). We would note that we see no conflict between this result and the statement in section 55(3) that such a notice has the same effect as a notice given under section 13 or 45. The giving of notice under section 13 or 45 triggers a requirement to bargain in good faith under section 14 and also generally acts as a precondition to the appointment of a conciliation officer. The giving of a section 55(3) notice to bargain has the same result. However, quite apart from this it also for certain other purposes acts as a certification of the union under section 7. There simply is no conflict.

5. It appears that counsel for the intervener is correct in his argument that given the proper timing, notice under section 55(3) could foreclose an open period in the event of the sale of a business. It is clear, however, that that did not happen in this case. It is also clear that it would only happen in rare cases, when all of the events that are a pre-condition coincide in time. In drafting section 55(10) the Legislature was obviously obliged to balance the interest of maintaining the stability of bargaining rights when there is a transfer of a business, on the one hand, with the freedom of employees to terminate the bargaining rights of their union, on the other hand.

6. By the plain language of the Act, and specifically by making sections 49 and 53 subject to the qualification of section 55(10), the Legislature has clearly opted to give precedence to preserving the stability of a union's bargaining rights where there has been a sale of a business. As the language of the Act reveals, the Legislature has adopted the view that special protection should extend to a union over the often unsettling period during which it seeks to establish a collective bargaining relationship with a new employer. In some cases the transition to a new management may be smooth and without incident as the successor

employer willingly accepts to renew the framework, if not the precise terms, of the previous collective agreement. The transition, can, however, be jarring to a union, especially if the new employer, bent on changing the style and methods of a business, brings fundamental proposals for change to the bargaining table. Some of these proposals may be acceptable to a union and some may not.

7. Where a business has changed hands the possibility of greater stress on a union is real; it can no longer be sure that it will bargain with the same expectations along the paths that it travelled time and again with the predecessor employer. In this sense a union bargaining with a successor employer after the transfer of a business is in a situation similar to a union bargaining a first collective agreement after certification. By enacting section 55(10) of the Act the Legislature has recognized that reality and has provided the union faced with a first negotiation with a successor employer the same protection of its bargaining rights as would operate to protect the negotiations of a first collective agreement. Like a newly certified union, a union dealing with a successor employer can proceed with the assurance that its bargaining rights cannot be subject to attack for a minimum of one year. That is the unequivocal effect of section 49(1) of the Act and it is the clearly intended consequence of section 55(10) of the Act.

8. The foregoing provisions represent a policy choice by the Legislature grounded in well established collective bargaining principles. In our view it would require clear and unequivocal language contrary to the existing language of the Act to support the argument of counsel for the intervener that section 55(10) was not intended to apply except in the case of the transfer of a business following certification. For the foregoing reasons the application must be dismissed.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. I do not disagree that the scheme of the Act is intended to ensure against the disruption of a bargaining relationship simply by virtue of the sale of a business. Unsettling as the thought might be to some, it is nonetheless true that some employers, no less than unions, would find the destabilization of a mature bargaining relationship unappetizing.

2. Viewed from this employer perspective the continuity assured by the successor rights provisions can be seen as mutually beneficial to the institutional interests of two of the parties — the company and the union.

3. However, in devising this means of providing continuity of a bargaining relationship, I see no need for the provision to take precedence over the already circumscribed right of the third party, the employees, to terminate the relationship between their employer and union if a majority of the employees so wish. Nor can I think our Legislators would have wished to subordinate the personal freedom of individual employees to the institutional interests of either employers or unions even in “rare cases” (see para. 5) as the majority of the Board acknowledges will be the case if their interpretation prevails.

4. In that the applicant was not represented by counsel, it remained for counsel to the respondent and intervener to assist the Board. For the reason stated above I find more persuasive the intervener’s argument that section 55 was not intended to foreclose entirely on the open season in the case of a sale, thereby giving the union a “windfall” in the sense of an extended period during which no termination application can be made.

5. Accordingly, I would have found the application to be timely and heard the case.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1981

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1284-80-R: Canadian Union of Public Employees, (Applicant) v. Saga Canadian Management Services Limited, (Respondent).

Unit: "all employees of the respondent working in St. Catharines, Ontario, save and except office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period". (*Having regard to the foregoing*). (72 employees in unit).

1990-80-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. The Craftsmen's Circle Limited, (Respondent).

Unit: "all employees of the respondent at its plant in London, Ontario, save and except foremen, persons, above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (26 employees in unit).

2044-80-R: Service Employees' International Union, Local 183, A.F.L., C.I.O., C.L.C., (Applicant) v. Robin Hood Multi-Foods Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Trenton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, quality control technicians, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (*Having regard to the submissions of the parties*). (203 employees in unit).

Unit #2: "all employees of the respondent at Trenton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff, and quality control technicians". (*Having further regard to the submissions of the parties*) (11 employees in unit).

2127-80-R: Canadian Union of Public Employees, (Applicant) v. Lakehead Planning Board, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Thunder Bay, save and except the administrator and those above the rank of administrator and secretary/secretary treasurer". (6 employees in unit). (Clarity Note).

2731-80-R: Ontario Public Service Employees Union, (Applicant) v. Metropolitan Separate School Board, (Respondent) v. Ontario Teachers' Federation, (Intervener #1) v. Canadian Union of Public Employees and its Local 1328, (Intervener #2).

Unit: "all employees of the respondent employed in the Department of Curriculum and Special Services as psychologists, psychometricians, social workers, speech pathologists, court workers, interpreters and the interpreter employed in the Public Relations Department save and except Chief Psychologist, Chief Social Worker, supervisors and assistant superintendents, persons above the rank of supervisor and assistant superintendent and persons covered by subsisting collective agreements". (65 employees in unit).

2823-80-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Hamilton Automobile Club, (Respondent).

Unit: "all employees employed as driver instructors by the respondent in the City of Burlington and the City of Oakville, save and except supervisors; those above the rank of supervisor, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week". (13 employees in unit).

0083-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Wells Fargo Armcar, Inc., (Respondent).

Unit: "all guard employees being security guards, messenger-driver guards and guards, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week". (38 employees in unit).

0185-81-R: Canadian Union of Public Employees, (Applicant) v. Goulbourn Township Public Library Board, (Respondent).

Unit: "all employees of the respondent save and except the bookkeeper-secretary, the chief librarian and persons above the position of chief librarian". (*Having regard to the agreement of the parties*). (5 employees in unit).

0217-81-R: The Employees Society of the Prescott & Russell Association for the Mentally Retarded, (Applicant) v. Prescott-Russell Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent in the united Counties of Prescott-Russell, save and except the Executive-director, secretaries to the Executive-Director, Manager of Residential Services, Manager of Vocational Services, Business Managers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (44 employees in unit).

0245-81-R: Retail, Commercial & Industrial Union, Local 206 Chartered by United Food & Commercial Workers International Union, (Applicant) v. Comstock Funeral Home Ltd., (Respondent) v. Wayne L. Smith, (Objector).

Unit: "all employees of the respondent employed at Peterborough, Ontario, save and except managers, persons above the rank of manager and persons regularly employed for not more than twenty-four (24) hours per week". (9 employees in unit).

0259-81-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Caswell Hotel (Sault) Limited, (Respondent).

Unit #1: "all employees of the respondent at Sault Ste. Marie, Ontario, save and except department heads, persons above the rank of department head, office staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement". (24 employees in unit).

Unit #2: "all employees of the respondent at Sault Ste. Marie, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, office staff and persons covered by a subsisting collective agreement". (23 employees in unit).

0342-81-R: Ontario Nurses' Association, (Applicant) v. Chateau Gardens (Lancaster) Inc., (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at Chateau Gardens (Lancaster)

Inc., Lancaster, save and except the Director of Nursing and persons above the rank of Director of Nursing". (3 employees in unit).

0369-81-R: United Steelworkers of America, (Applicant) v. Canterbury Foods carrying on business as Crock & Block Restaurant and Tavern, (Respondent).

Unit: "all employees of the respondent in Burlington, Ontario, save and except Assistant Managers and those above the rank of Assistant Manager, Dining Room Supervisor, Kitchen Supervisors, Management Trainees and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (53 employees in unit).

0369-81-R: United Steelworkers of America, (Applicant) v. Canterbury Foods carrying on business as Crock & Block Restaurant and Tavern, (Respondent).

Unit #1: "all employees of the respondent in Burlington, Ontario, save and except Assistant Managers, persons above the rank of Assistant Manager, Management Trainees and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (40 employees in unit).

Unit #2: "all employees of the respondent in Burlington, Ontario, who are regularly employed for not more than 24 hours per week, and students employed during the school vacation period". (13 employees in unit).

0454-81-R: Christian Labour Association of Canada, (Applicant) v. Unger Nursing Homes Limited, (Respondent).

Unit: "all employees of the respondent at Hamilton, Ontario, save and except registered nurses, director of nurses, administrator, office staff and persons covered by a subsisting collective agreement". (Having regard to the agreement of the parties). (3 employees in unit).

0431-81-R: Retail, Commercial and Industrial Union, Local 206 Chartered by the United Foods & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Applicant) v. Fabricland Distributors, (Respondent) v. Employee, (Objector).

Unit: #1: "all employees of the respondent at Markham, save and except store manager, persons above the rank of store manager, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (1 employee in unit).

Unit #2: "all employees of the respondent at Markham regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager". (*Having regard to the agreement of the parties*). (5 employees in unit).

0479-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Kaneff Properties Limited, (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 2211 Sherobee Road, Mississauga, Ontario, including resident managers, persons above the rank of resident manager, and office and clerical staff". (3 employees in unit).

0490-81-R: Hillel Academy Teachers' Association, (Applicant) v. Ottawa Talmud Torah Board, (Respondent).

Unit: "all employees of the respondent at Hillel Academy in the Regional Municipality of Ottawa-Carleton save and except teachers' aides, teacher emissaries hired outside of Canada through Jewish educational agencies, Bar Mitzvah teachers, office staff, the Principal, the Director of Education,

cleaning and maintenance staff and lunchroom aides”. (*Having regard to the agreement of the parties*). (35 employees in unit).

0494-81-R: Canadian Telephone Employees Association, (Applicant) v. Bell Canada International, (Respondent).

Unit: “all office and clerical employees of the respondent in Metropolitan Toronto and the City of Ottawa, save and except supervisors, persons above the rank of supervisor and persons employed in a confidential capacity in matters relating to labour relations”. (*Having regard to the agreement of the parties*). (*Clarity Note*). (53 employees in unit).

0496-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Bennett Paving & Materials Limited, (Respondent).

Unit: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same and all construction labourers and truck drivers in the employ of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (8 employees in unit).

0508-81-R: International Union of Electrical, Radio and Machine Workers, (Applicant) v. Universal Grinding Wheel Division of Unicorn Abrasives of Canada, (Respondent).

Unit: “all employees of the respondent at Brockville, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period”. (*Having regard to the agreement of the parties*). (49 employees in unit).

0517-81-R: United Steelworkers of America, (Applicant) v. Contractors Machinery & Equipment, a Division of Kidde Canada Limited, (Respondent).

Unit: “all employees of the respondent in Burlington, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period”. (*Having regard to the agreement of the parties*). (22 employees in unit). (*Clarity Note*).

0535-81-R: Ontario Public Service Employees Union, (Applicant) v. The Great War Memorial Hospital of Perth District, (Respondent).

Unit #1: “all employees of the respondent at Perth, save and except professional medical staff, office and clerical employees, registered, graduate and undergraduate nurses, paramedical employees, department heads, supervisors, and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements”. (*Having regard to the agreement of the parties*). (37 employees in unit).

Unit #2: “all employees of the respondent at Perth regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except professional medical staff, office and clerical employees, registered, graduate and undergraduate nurses, paramedical employees, department heads, supervisors and persons above the rank of supervisor, and persons covered by subsisting collective agreements”. (*Having regard to the agreement of the parties*). (18 employees in unit).

0541-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. McAuley Fuels Limited, Division of Ultramar Canada Inc., (Respondent).

Unit: "all employees of the respondent in Sault Ste. Marie, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (Having regard to the agreement of the parties). (7 employees in unit).

0604-81-R: Canadian Union of Public Employees, (Applicant) v. Lawrence Heights Community Day Care Centre, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisor and persons above the rank of supervisor". (Having regard to the agreement of the parties). (9 employees in unit).

0562-81-R: Retail, Wholesale and Department Store Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Patton's Place Ltd., (Respondent).

Unit: "all employees of the respondent at its warehouse operations in London, Ontario, save and except warehouse managers, persons above the rank of warehouse manager and office staff". (Having regard to the agreement of the parties). (38 employees in unit).

0572-81-R: Construction Workers Local No. 150 (C.L.A.C.), (Applicant) v. L & J Plumbing & Heating Ltd., (Respondent).

Unit: "all plumbers, plumbers' apprentices, sheet metal workers and sheet metal apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (*Having regard to the foregoing*). (2 employees in unit).

0573-81-R: Toronto Typographical Union No. 91 (ITU), (Applicant) v. John Darling Graphics Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except the plant manager, persons above the rank of plant manager, office, clerical and sales staff". (*Having regard to the agreement of the parties*). (5 employees in unit).

0574-81-R: Ontario Public Service Employees Union, (Applicant) v. North Bay and District Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent employed in the City of North Bay, Ontario, save and except Program Directors, Group Home Directors, persons above the rank of Director, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (38 employees in unit).

0575-81-R: Canadian Union of Public Employees, (Applicant) v. Metropolitan Toronto Library Board, (Respondent).

Unit: "all professional Librarians in the employ of the respondent who are regularly employed for not more than twenty-four (24) hours per week". (*Having regard to the agreement of the parties*). (2 employees in unit).

0595-81-R: Canadian Union of Public Employees, (Applicant) v. Family and Children's Services of the County of Lanark and the Town of Smiths Falls, (Respondent).

Unit: "all employees of the respondent in Lanark County and the Town of Smiths Falls, Ontario, save

and except Director, Supervisor of Protection Unit, Supervisor of Services, Office Manager, Executive Secretary, Bookkeeper, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (13 employees in unit).

0601-81-R: United Food and Commercial Workers International Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Dundas I.G.A. Market, (Respondent).

Unit: "all employees of the respondent in Dundas, Ontario, save and except the meat manager, store manager, persons above the rank of store manager, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (3 employees in unit).

0602-81-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75 of the Hotel and Restaurant Employees and Bartenders International Union (A.F.L.-C.I.O.-C.L.C.), (Applicant) v. Nags Head Tavern, (Respondent) v. International Beverage Dispensers' and Bartenders' Union Local 280 (A.F.L.-C.I.C.-C.L.C.), (Intervener).

Unit: "all employees of the respondent at the Nags Head Tavern, 74 York Street, Toronto, Ontario, save and except manager, supervisor, those above the rank of supervisor, sales and office and account staff and those employees covered by an existing collective agreement with Local 75, Hotel, Restaurant and Cafeteria Employees Union, Toronto, Ontario". (*Having regard to the agreement of the parties*). (14 employees in unit).

0603-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Kent Drugs Ltd. (Drug City), (Respondent).

Unit #1: "all employees of the respondent at Orangeville, Ontario save and except store manager and assistant store manager, persons above the rank of assistant store manager, pharmacists, persons regularly employed for not more than 24 hrs. per week, and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (8 employees in unit).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hrs. per week and students employed during the school vacation period, save and except pharmacists". (*Having regard to the agreement of the parties*). (8 employees in unit). (Clarity Note).

0605-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Greenwin Property Management, (Respondent).

Unit: "all employees of the company engaged in cleaning and maintenance at 75 Tandridge Crescent, Rexdale, Ontario and townhouses (block 900 and block 1000) at Tandridge Crescent, Rexdale, including resident superintendents, save and except housing managers, persons, above the rank of housing managers, office and clerical staff". (*Having regard to the agreement of the parties*). (7 employees in unit).

0614-81-R: Canadian Union of Public Employees, (Applicant) v. The Margaret Fletcher Day Care Centre, Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisor, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (8 employees in unit).

0629-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Murphy Tobacco Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at London, Ontario, save and except office

manager, persons above the rank of office manager, and persons regularly employed for not less than twenty-four (24) hours per week". (*Having regard to the representations of the parties*). (8 employees in unit).

0630-81-R: Labourers' International Union of North America, Local 183, (Applicant v. York Condominium Corporation No. 201, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 205 Hilda Avenue, Willowdale, Ontario including resident superintendents, save and except property manager, office and clerical staff". (*Having regard to the agreement of the parties*). (3 employees in unit).

0639-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Benros Painting Company Ltd., (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (9 employees in unit).

0665-81-R: Ontario Public Service Employees Union, (Applicant) v. V.S. Services, (Respondent).

Unit #1: "all employees of the respondent at its unit located at Prince Edward Heights Mental Retardation Facility, Picton, Ontario, save and except senior cook, supervisors, those above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (14 employees in unit).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, at its unit located at Prince Edward Heights Mental Retardation Facility, Picton, Ontario". (*Having regard to the agreement of the parties*). (11 employees in unit).

0667-81-R: The International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Mascon Limited, (Respondent).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemason's apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (14 employees in unit).

0671-81-R: Canadian Union of Public Employees, (Applicant) v. The Peel Board of Education, (Respondent) v. The Peel Board of Education Custodian & Maintenance Employees' Association, (Intervener).

Unit: "all employees of the respondent engaged as custodial staff, maintenance staff, storekeepers, printing staff, cafeteria help and school bus drivers, save and except Assistant Supervisors, foremen, persons above the rank of Assistant Supervisor or foreman, those employed as office personnel, employees employed for less than twenty-four hours per week and students employed during the school vacation period". (404 employees in unit).

0684-81-R: United Food and Commercial Workers Union Local 1000 A, (Applicant) v. Fisher Scientific Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Whitby, save and except for Supervisors, those above the rank of Supervisor, office, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (28 employees in unit).

0688-81-R: Canadian Union of Public Employees, (Applicant) v. Port Colborne Public Library Board, (Respondent).

Unit: "all employees of the respondent in Port Colborne, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except chief librarian's assistant and persons above the rank of chief librarian's assistant". (*Having regard to the agreement of the parties*). (17 employees in unit).

0695-81-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, (Applicant) v. Wegu Canada Inc., (Respondent).

Unit: "all employees of the respondent at Whiteby, Ontario, save and except foremen, foreladies, persons above the rank of foreman, forelady, office staff and sales staff". (*Having regard to the agreement of the parties*). (40 employees in unit).

0696-81-R: Graphic Arts International Union, Local 211 Toronto, Ontario, (Applicant) v. Tollefson Lithographing Ltd., (Respondent), v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Oakville, Ontario, save and except non-working foremen, Persons above the rank of non-working foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (27 employees in unit).

0705-81-R: The Ottawa Newspaper Guild, Local 205, The Newspaper Guild, (Applicant) v. The Citizen, A Division of Southam Inc., (Respondent).

Unit: "all employees of the respondent employed in its Fleet Control Department in Ottawa, save and except the Fleet Control Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (6 employees in unit).

0706-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Ashton Carpentry Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (11 employees in unit).

0709-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Monte Grappa Carpentry, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Town of Oakville and Milton in the County of Halton and the Township of Pickering and the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

0711-81-R: United Brotherhood of Carpenters and Joiners of America — Local 1190, (Applicant) v. Two Star Construction Ltd., (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (27 employees in unit).

0710-81-R: United Brotherhood of Carpenters and Joiners of America — Local 1190, (Applicant) v. Valley Carpenters, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (12 employees in unit).

0719-81-R: Ottawa Typographical Union, Local 102, (Applicant) v. The Winchester Press Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent employed at 545 St. Lawrence Street in the town of Winchester, Ontario, save and except Co-Publishers, President and persons regularly employed for not more than 24 hours per week”. (*Having regard to the agreement of the parties*). (14 employees in unit).

Unit #2: “all employees of the respondent employed at 584 Main Street in the Town of Winchester, Ontario, save and except Co-Publishers, President and persons regularly employed for not more than 24 hours per week”. (*Having regard to the agreement of the parties*). (5 employees in unit). (*Clarity Note*).

0725-81-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Red Cliffe Estate Ltd. and/or Red Cliff Homes, (Respondents).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (4 employees in unit).

0726-81-R: Labourers’ International Union of North America, Local 183, (Applicant) v. D. L. Consturction Ltd., (Respondent).

Unit: “all carpenters and carpenters’ apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, comkmercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (16 employees in unit).

0727-81-R: Labourers’ International Union of North America, Local 183, (Applicant) v. N. R. Carpentry Limited, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the

County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

0729-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Gaudio Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices' and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit).

0734-81-R: The International Association of Machinists and Aerospace Workers, (Applicant) v. Byers-Bush (1977) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (19 employees in unit).

0735-81-R: United Food and Commercial Workers International Union, Local 175 AFL-CIO-CLC, (Applicant) v. Richard Fiorvanti/Dundas I. G. A., (Respondent).

Unit: "all employees of the respondent at Dundas, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except meat manager, store manager and persons above the rank of store manager". (*Having regard to the agreement of the parties*). (5 employees in unit).

0743-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. A. & G. Carpenters, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (10 employees in unit).

0747-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Taiedos Construction Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit).

0744-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. C. & V. Carpentry, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in the unit).

0749-81-R: United Steelworkers of America, (Applicant) v. Tru-View Aluminum Products, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff". (*Having regard to the agreement of the parties*). (18 employees in unit).

0754-81-R: Energy & Chemical Workers Union, (Applicant) v. Liquid Carbonic Inc., (Respondent).

Unit: "all employees of the respondent at its Maitland, Ontario, Plant, save and except the assistant superintendent, those above the rank of assistant superintendent, office and sales persons, and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (8 employees in unit).

0756-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Keele Carpentry Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

0757-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Rolly Carpenters Contractor, (Respondent).

Unit: "all carpenters, carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

0758-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. C. A. S. Carpentry Co., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Township of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (*Having regard to the foregoing*). (12 employees in unit).

0759-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Two Star Carpentry, (Respondent) v. United Brotherhood of Carpenters and Joiners and America, Local 1190, (Intervener).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Board Area #8, excluding the industrial, commercial and institutional sector of the construction industry. Those bargaining rights in respect of carpenters and carpenters' apprentices, however, are held by the United Brotherhood of Carpenters and Joiners of America, Local 1190 (see the Board's decision in File No. 0711-81-R which issued July 8, 1981 in respect of an application for certification made June 26, 1981). Therefore the Board further finds that all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (24 employees in unit).

0769-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Raf-Tar Construction Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (12 employees in unit).

0771-81-R: Graphic Arts International Union, Local 28-B, (Applicant) v. Heritage Press Co. Limited, (Respondent).

Unit: "all employees of the respondent in Mississauga, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, employees covered by a subsisting collective agreement, employees in typesetting, proofreading and paste-up departments, persons regularly employed for not more than twenty-four (24) hours per week and students employed during their school vacation periods". (*Having regard to the agreement of the parties*). (11 employees in unit).

0777-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. M. Santos Carpentry Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit).

0778-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Frias Construction Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto and Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (*Having regard to the agreement of the parties*). (4 employees in unit).

0787-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Bennett Paving & Materials Limited, (Respondent).

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same and all construction labourers and truck drivers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Young and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (13 employees in unit).

0788-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. H & R Developments, (Respondent).

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar

equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

0794-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. W. R. Painting & Decorating Ltd., (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

0805-81-R: United Brotherhood of Carpenters and Joiners of America — Local 1190, (Applicant) v. Fairbank Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (10 employees in unit).

0825-81-R: United Food and Commercial Workers Union Local 1000A, (Applicant) v. Fisher Scientific Limited, (Respondent).

Unit: "all office employees of the respondent in the Town of Whitby, save and except supervisors, persons above the rank of supervisor, secretary to the plant manager, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (18 employees in unit). (*Clarity Note*).

0835-81-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Forsythe Lubrication Association Limited, (Respondent).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except foremen, persons above the rank of foreman, sales and office staff, laboratory staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (10 employees in unit).

BARGAINING AGENTS CERTIFIED SUBSEQUENT TO A PRE-HEARING VOTE

2526-80-R: The Blue Cross Employees' Association, (Applicant) v. Ontario Hospital Association (Blue Cross), (Respondent)

Unit: "all office and clerical employees of The Ontario Hospital Association within the Municipality of Metropolitan Toronto, save and except section heads, managers or coordinators, persons above the rank of section head, manager and co-ordinator, secretaries to those above the rank of supervisor, audio visual staff, sales staff, communications staff, print shop staff, mail room clerks regularly assigned to reading mail, internal auditors, consultants, all employees in the Hospital Employee Relations Services Department (including personnel and payroll staff), all employees of the Investment Services Department, all employees of the Hospital Accident Prevention Department, Systems analysts, programmers and all computer operations staff, maintenance engineers, pharmaceutical chemists,

students employed during the school vacation periods and persons regularly employed for not more than twenty four hours or less per week. (443 employees in unit).

Number of names of persons on list as originally prepared by employer		439
Number of persons who cast ballots	386	
Number of spoiled ballots	8	
Number of ballots marked in favour of applicant	196	
Number of ballots marked in favour of intervener	123	
Ballots segregated and not counted	59	

0385-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. M. Loeb Limited, (Respondent)

Unit: "all office and clerical employees of the respondent in Ottawa, save and except those employees working at the respondent's head office, those employees working for Top Valu Gasmarts, those employees in personnel department, buyers, outside sales staff, dispatchers, confidential secretaries, supervisors, persons above the rank of supervisor, those employees regularly employed for not more than 24 hours her week and students employed during the school vacation period". (117 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		112
Number of persons who cast ballots	104	
Number of ballots marked in favour of applicant	57	
Number of ballots marked against applicant	47	

0391-81-R: Canadian Union of Public Employees, (Applicant) v. Sault Ste. Marie & District Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent in the City of Sault Ste. Marie in the District of Algoma, in the Province of Ontario regularly employed for not more than twenty-four hours per week, save and except office and clerical employees, program supervisors, and those above the rank of program supervisor". (19 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	3	

0418-81-R: Canadian Union of Public Employees, (Applicant) v. Waterloo County Roman Catholic Separate School Board (Respondent).

Unit: "all office and clerical employees of the respondent in the Regional Municipality of Waterloo regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period and persons doing the office and clerical work of St. Mary's Girls High School and St. Jerome's Boys' High School". (100 employees in unit).

Number of names of persons on revised voters' list		102
Number of persons who cast ballots	62	
Number of ballots marked in favour of applicant	41	
Number of ballots marked against applicant	21	

BARGAINING AGENTS CERTIFIED SUBSEQUENT TO A POST-HEARING VOTE

0259-81-R: Retail Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Caswell Hotel (Sault) Limited, (Respondent).

Unit #1: "all employees of the respondent at Sault Ste. Marie, Ontario, save and except department heads, persons above the rank of department head, office staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacations period and persons covered by a subsisting collective agreement". (50 employees in unit).

Unit #2: "all employees of the respondent at Sault St. Marie, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except, department heads, persons above the rank of department head, office staff and persons covered by a subsisting collective agreement".

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	25	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	24	
Number of segregated ballots cast by persons whose name appear on voters' list	1	
Number of ballots marked in favour of applicant	18	
Number of ballots marked against applicant	6	

0536-81-R: Ontario Public Service Employees Union, (Applicant) v. The Great War Memorial Hospital of Perth District, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent in Perth, Ontario, save and except secretary to administrator and secretary to assistant administrator, department heads, supervisors, and persons above the rank of supervisor, paramedical employees, persons, regularly employed for not more than 24 hours per week and students employed during the school vacation periods". (21 employees in unit).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	7	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0087-81-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, (Applicant) v. Anchor Shoring Limited, (Respondent).

0108-81-R: Christian Labour Association of Canada, (Applicant) v. Park Lane Nursing Home Limited, (Respondent) v. Employee, (Objector).

0549-81-R: Seafarers' International Union of Canada, AFL-CIO-CLC, (Applicant) v. Wakeham & Son Ltd., (Respondent) v. Local 401 — Canadian Maritime Union Canadian Brotherhood of Railway Transport & General Workers, (Intervener) v. Group of Employees, (Objectors).

0559-81-R: Labourers' International Union of North America Local 1081, (Applicant) v. Pebbles Construction Group, (Respondent).

Certifications Dismissed Subsequent To a Pre-Hearing Vote

0465-81-R: Canadian Paperworkers Union, (Applicant) v. BioShell Inc., (Respondent) v. Lumber & Sawmill Workers Union, Local 2995, (Intervener).

Unit: "all employees of the respondent at Hearst, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (20 employees in unit).

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	16

Certifications Dismissed Subsequent To a Post-Hearing Vote

0212-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. A. J. Bus Lines Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See *Bargaining Unit #2 Agents Certified — Post-Hearing Vote*)

Unit #2: "all employees of the respondent at Elliot Lake regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, and office and sales staff". (*Having regard to the agreement of the parties*). (36 employees in unit).

Number of names of persons on list as originally prepared by employer	31
Number of persons who cast ballots	25
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	11
Ballots segregated and not counted	1

0258-81-R: United Steelworkers of America, (Applicant) v. Ingersoll Machine and Tool Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the respondent at the Ingeroll Machine and Toll Company plant at Ingersoll, save and except supervisors, persons above the rank of supervisor and security guards". (22 employees in unit). (*Clarity Note*).

Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	18

0434-81-R: Food and Service Workers of Canada, (Applicant) v. Concorde Maintenance Limited, (Respondent).

Unit: "all employees of the respondent employed at York Centre, 145 King Street West, Toronto, save and except forepersons, persons above the rank of foreperson, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (*Having regard to the agreement of the parties*). (27 employees in unit).

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots	24	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	17	
Ballots segregated and not counted	1	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0370-81-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1244; 1410; 1425; 1592; 1669; 1916 and 2309, (Applicant) v. Richards-Wilcox Door Systems (Toronto) Limited, Richards-Wilcox of Canada Limited, (Respondent). (*Withdrawn*).

0516-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. The Top Banana Limited, (Respondent). (*Withdrawn*).

0548-81-R: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. George Wimpey Canada Limited, (Respondent) v. Ontario Provincial Conference, O.P. & C.M.I.A., (Intervener #1) v. A council of Trade Unions, Acting as Representative of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 880, and Labourers' International Union of North America, Local 625-749 and International Union of Operating Engineers, Local 793, (Intervener #2). (*Withdrawn*).

0585-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. The Top Banana Ltd., (Respondent). (*Withdrawn*).

0608-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Royal Decorating, (Respondent). (*Withdrawn*).

0613-81-R: United Rubber, Cork, Linoleum and Plastic Workers of America, (Applicant) v. Ackripak Inc., (Respondent). (*Withdrawn*).

0702-81-R: Teamsters Local Union No. 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. H. Ruhl Machinery Co. Ltd., (Respondent). (*Withdrawn*).

0703-81-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. H. Ruhl Machinery Co. Ltd., (Respondent). (*Withdrawn*).

0712-81-R: Canadian of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304, (Applicant) v. Labatt's Ontario Breweries Ltd., (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1826-80-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Contempoform Incorporated and CTF Construction Ltd., CTF Contracting, (Respondents). (*Granted*).

2831-80-R: Labourers' International Union of North America, Local 506, (Applicant) v. Toronto Zenith Contracting Limited and Zentor Construction Limited, (Respondents). (*Withdrawn*).

0116-81-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bramalea Carpentry Associates and Pinehurst Woodworking Company Limited, (Respondents). (*Dismissed*).

0192-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Aykroyd Construction 1965 Ltd., (Respondent). (*Granted*).

731-81-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. The Top Banana Ltd., (Respondent) v. Group of Employees, (Objectors). (*Withdrawn*).

0741-81-R: Labourers' International Union of North America, Local 1089, (Applicant) v. M.H.G. International Ltd., (Respondent). (*Withdrawn*).

0791-81-R: United Steelworkers of America, (Applicant) v. Frankel Steel Limited, (Respondent) v. Shopmen's Local Union 834 of the International Association of Bridge, Structural and Ornamental Ironworkers, (Intervener). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0234-81-R: Donna Barnes, (Applicant) v. International Beverage Dispensers and Bartenders Union, Local 280, (Respondent).

Unit: "all tapmen, bartenders, beverage waiters, (including waiters who operate automatic beer dispensers or other automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic beverages". (6 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	6

2666-80-R: James Etherington, (Applicant) v. Teamsters Local Union No. 879, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Cayuga Materials and Construction Co. Limited, (Intervener).

Unit: "all employees of Cayuga Materials and Construction Co. Limited at or out of the company's sand gravel operation at Cayuga, in the Regional Municipality of Haldimand-Norfolk, including all employees operating equipment leased into or leased out by the company working in the operation of the company, save and except foremen, dispatchers, persons above the rank of foreman and dispatcher, office and sales staff, students employed during the school vacation period and employees engaged in the intervener's road building operation including labourers and persons engaged in the operation of cranes, shovels, bull-dozers and similar equipment and those primarily engaged in the repairing and maintaining of the same and those employees covered by other subsisting agreements". (29 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		40
Number of persons who cast ballots	33	
Number of ballots marked in favour of respondent	13	
Number of ballots marked against respondent	20	

2440-80-R: Mr. Chris Berzins, (Applicant) v. Service Employees International Union, Local 204, (Respondent) v. Clarke Institute of Psychiatry, Joan Snapp, (Intervener). (*Dismissed*).

0135-80-R: Operative Plasterers' and Cement Masons' International Association, Local 598, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Underground Services Limited, (Intervener). (*Dismissed*).

0366-81-R: Antonio Ciniello, and others, (Applicant) v. United Steelworkers of America, (Respondent) v. Metropolitan Garage Doors Limited, (Intervener).

Unit: "all employees of Metropolitan Garage Doors Limited at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period". (6 employees in unit). (*Dismissed*).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent	8	
Number of ballots marked against respondent	0	

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0760-81-U: B. C. L. Canada Inc., (Applicant) v. Amalgamated Clothing and Textile Workers' Union, Local 1332 and those persons named in "Schedule A", (Respondent). (*Granted*).

0762-81-U: Lummus Canada Inc., (Applicant) v. Karl Airadsinen, et al, (Respondents). (*Granted*).

0763-81-U: Acme Building and Construction Limited and Tesc Contracting Limited, (Applicants) v. Local 1036, Labourers' International Union of North America, Jimmie Lewis and Wayne Bashaw, et al, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2524-80-U: The Canadian Union of Public Employees, Local 870, (Complainant) v. The Perley Hospital, (Respondent). (*Dismissed*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1125-80-R: International Ladies' Garment Workers' Union, (Complainant/Applicant) v. Newport Sportswear Limited, (Respondent). (*Denied*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1275-80-U: International Ladies' Garment Workers' Union, (Complainant/Applicant) v. Newport Sportswear Limited, (Respondent). (*Granted*).

1276-80-U: International Ladies' Garment Workers' Union, (Complainant/Applicant) v. Newport Sportswear Limited, (Respondent). (*Granted*).

1954-80-U: The United Brotherhood of Carpenters and Joiners of America, Circle Limited, (Respondent). (*Granted*).

2045-80-U: Service Employees' International Union, Local 183, A.F.L., C.I.O., C.L.C., (Applicant) v. Robin Hood Multi-Foods Inc., (Respondent) v. Group of Employees, (Objectors). (*Granted*).

2054-80-U: The United Brotherhood of Carpenters and Joiners of America, Local 3054, A.F.L., C.I.O., C.K.C., (Applicant) v. The Craftsmen's Circle Limited, (Respondent). (*Granted*).

2055-80-U: International Ladies' Garment Workers' Union, (Complainant/Applicant) v. Newport Sportswear Limited, (Respondent). (*Granted*).

2705-80-U: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Contempoform Incorporated and CTF Construction Ltd., CTF Contracting, (Respondents). (*Granted*).

2781-80-U: Mel Davidson (Badge 9249), (Complainant) v. Toronto Transit Commission, (Respondent). (*Withdrawn*).

2837-80-U: Alexander Barna, (Complainant) v. The Canadian Brotherhood of Railway, Transport and General Workers and its Local 271, (Respondents). (*Granted*).

2856-80-U: Mel Davidson (badge 9249), (Complainant) v. The Amalgamated Transit Union Local 113, (Respondent). (*Withdrawn*).

0003-81-U: Thomas Brent Jenkison, (Complainant) v. Hotel, Restaurant and Cafeteria Employees' Union Local 75, (Respondent). (*Withdrawn*).

0135-81-U: United Brotherhood of Carpenters and Joiners of America, Loc. 2679, (Complainant) v. Convex System Limited, (Respondent). (*Withdrawn*).

0188-81-U: Camillo Manfredi, (Complainant) v. Canadian Construction, Building Maintenance & General Workers' Union, (Respondent). (*Dismissed*).

0202-81-U: Bhupinder Singh Sidhu, (Complainant) v. Printing Specialties and Paper Products Union, Local 466, (Respondent). (*Dismissed*).

0225-81-U: International Beverage Dispensers and Bartenders Union, Local 280, (Complainant) v. Cloverleaf Hotel, Division of MIB Holdings Ltd., (Respondent). (*Granted*).

0229-81-U: The Hotel, Motel and Restaurant Employees and Beverage Dispensers Union, Local 757, (Complainant) v. Landmark Motor Inn (Thunder Bay, Ontario). (*Withdrawn*).

0315-81-U: Consumers Distributing Company Limited, (Complainant) v. United Food and Commercial Workers International Union, AFL-CIO-CLC, (Respondent). (*Withdrawn*).

0323-81-U: Food and Service Workers of Canada, (Complainant) v. Zum Rudy's Foods Limited, (Respondent). (*Withdrawn*).

0351-81-U: Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Ironworkers, (Complainant) v. Empco-Fab Ltd. and Edgar R. Wunsche, (Respondent). (*Withdrawn*).

0397-81-U: Food and Service Workers of Canada, (Complainant) v. Zum Rudy's Foods Limited, (Respondent). (*Withdrawn*).

0456-81-U: Food and Service Workers of Canada, (Complainant) v. Zum Rudy's Foods Limited, (Respondent). (*Withdrawn*).

0495-81-U: Ennio Frustik, (Complainant) v. C.U.P.E. Local 43, (Respondent). (*Withdrawn*).

0500-81-U: Simcoe Mechanical Contracting Limited, (Complainant) v. Toronto-Central Ontario Building and Construction Trades Council and United Association of the Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Respondents). (*Withdrawn*).

0504-81-U: United Food & Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home and Patricia Ing, (Respondent). (*Withdrawn*).

0539-81-U: Mrs. Maria Ferreira, (Complainant) v. Club & Hotel Workers Local #299, (Respondent). (*Withdrawn*).

0544-81-U: Joe Portiss, (Complainant) v. Financial Secretary and Business Manager, (Respondent). (*Withdrawn*).

0545-81-U: Joe Portiss, (Complainant) v. Business Representative of Local 1089, (Respondent). (*Withdrawn*).

0546-81-U: Helen McBennett, June MacLeod, Chris Sforza and Kathy Goba, Employees of K-Mart Canada Ltd., (Complainants) v. Retail, Wholesale and Department Store Union, AFL:CIU:CLC George Ross, Heather Jacques, Brian Barton, Carmella Cormier, Ann McMillan, Carmella Scalli and Wendy Braun, (Respondents). (*Withdrawn*).

0554-81-U: Fimbar King (Joe), (Complainant) v. Canadian Union of Public Employees Local 1487, Scarborough General Hospital, Scarborough, (Respondents). (*Withdrawn*).

0568-81-U: The Association of Allied Health Professionals: Ontario, (Complainant) v. St. Mary's of the Lake Hospital, (Respondent). (*Withdrawn*).

0569-81-U: The Hotel, Motel and Restaurant Employees and Beverage Dispensers Union, Local 757, (Applicant) v. Westfort Hotels Ltd., (Respondent). (*Withdrawn*).

0576-81-U: Joanna D'Amore, (Complainant) v. Larry Cooke, (Respondent). (*Withdrawn*).

0578-81-U: Canadian Textile & Chemical Union, (Complainant) v. Albert Sliwinski Ltd. (Carrying on business as Avon Sportswear), (Respondent). (*Withdrawn*).

0579-81-U: The United Steelworkers of America Local 6855, (Complainant) v. Falconbridge Nickel Mines Limited, (Respondent). (*Withdrawn*).

0584-81-U: Retail, Wholesale and Department Store Union, AFL:CIP:CLC, (Complainant) v. The Top Banana Ltd., (Respondent). (*Withdrawn*).

0586-81-U: Service Employees' International Union, Local 204, (Complainant) v. K-Mart Canada Limited, (Respondent). (*Withdrawn*).

0587-81-U: Service Employees' International Union, Local 204, (Complainant) v. K-Mart Canada Limited, (Respondent). (*Withdrawn*).

0599-81-U: Al Minicola, (Complainant) v. International Beverage Dispensers' and Bartenders' Union, Local 280, (Respondent). (*Withdrawn*).

0606-81-U: Ekrem Horsun, (Complainant) v. United Rubber Cork, Linoleum and Plastic Workers of America Loc. 723, (Respondent). (*Withdrawn*).

0612-81-U: The United Garment Workers of America, Local No. 253, (Complainant) v. Hudson Sportswear, (Respondent). (*Withdrawn*).

0626-81-U: Hotel and Restaurant Employees and Bartenders Union Local 604 A.F. of L., C.I.O., C.L.C., (Complainant) v. 352572 Ontario Limited, Queens Hotel, President Hart Falkenberg, (Respondent). (*Dismissed*).

0637-81-U: Retail, Wholesale and Department Store Union, AFL: CIO:CLC, (Complainant) v. Algoden Hotel (342399 Ontario Limited), (Respondent). (*Withdrawn*).

0641-81-U: United Brotherhood of Carpenters and Joiners of America, Local 494, (Complainant) v. George Wimpey Canada Limited, (Respondent). (*Withdrawn*).

0642-81-U: International Ladies' Garment Workers' Union, (Complainant) v. Omega Neckwear and Apparel Limited, (Respondent). (*Withdrawn*).

0658-81-U: Debbie Logan, (Complainant) v. Phillips Security Agency Inc., (Respondent). (*Withdrawn*).

0674-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. K-Mart Canada Limited, (Respondent). (*Withdrawn*).

0675-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. K-Mart Canada Limited, (Respondent). (*Withdrawn*).

0676-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Algoden Hotel (342399 Ontario Limited), (Respondent). (*Withdrawn*).

0677-81-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC, (Complainant) v. Algoden Hotel (342399 Ontario Limited), (Respondent). (*Withdrawn*).

0680-81-U: The United Garment Workers of America, Local No. 253, (Complainant) v. Style-Kraft Sportswear, (Respondent). (*Withdrawn*).

0687-81-U: Canadian Union of Educational Workers, Local 2: Graduate Assistants' Association, (Complainant) v. The Governing Council of the University of Toronto, (Respondent). (*Withdrawn*).

0718-81-U: John Ellwood, (Complainant) v. United Automobile, Aerospace & Agricultural Implement Workers of America — UAW Local 200, Windsor, Ontario, (Respondent). (*Dismissed*).

0733-81-U: Peter George, (Complainant) v. United Steelworkers of America Local 2859, Babcock & Wilcox Canada Ltd., (Respondent). (*Withdrawn*).

0761-81-U: Donald A. McNabb, (Complainant) v. Burloak Mechanical Limited, (Respondent). (*Withdrawn*).

0806-81-U: Office and Professional Employees International Union, (Complainant) v. St. Catharines Civic Employees Credit Union Limited, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

0553-81-OH: Fimbar King (Complainant) v. Scarborough General Hospital, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0532-81-M: Work Wear Corporation of Canada Ltd., Belleville, Ontario, (Employer) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351, (Trade Union). (*Granted*).

0533-81-M: Work Wear Corporation of Canada Ltd. (Waterloo Division), (Employer) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351, (Trade Union). (*Granted*).

0566-81-M: Pilkington Glass Limited Ontario Metal Shop — Contract Division, Vaughan Township, (Employer) v. Glaziers Local 1819, Brotherhood of Painters and Allied Trades, (Trade Union). (*Granted*).

SALE OF A BUSINESS

0509-81-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 637, (Applicant) v. Tri-Canada Inc., (Respondent) v. Coulter Copper & Brass Limited, (Intervener #1) v. Tri-Canada Employees' Association, (Intervener #2). (*Withdrawn*).

FINANCIAL STATEMENTS

1592-80-M: Murray G. Strong, (Applicant) v. Carl Finlay, Secretary-Treasurer, Local #222, United Automobile, Aerospace and Agricultural Implement Workers of America, (Respondents). (*Dismissed*).

JURISDICTIONAL DISPUTES

0042-81-JD: Labourers' International Union of North America, Local 506, (Applicant) v. International Union of Bricklayers and Allied Craftsmen, Local No. 2 and Camsyl Insulation Inc. and Ellis-Don Limited, (Respondents). (*Withdrawn*).

0291-81-JD: Local 666, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Complainant) v. E. S. Fos Limited, (Respondent) v. Sheet Metal Worker's International Associations Local 537, (Intervener). (*Withdrawn*).

APPLICATIONS UNDER THE COLLEGES COLLECTIVE BARGAINING ACT (SECTION 82)

0526-80-M: Ontario Public Service Employees Union, (Applicant) v. Niagara College of Applied Arts and Technology, (Respondent). (*Denied*).

2720-80-M: Ontario Public Service Employees Union, (Applicant) v. George Brown College of Applied Arts and Technology, (Respondent). (*Withdrawn*).

0131-81-M: Ontario Public Service Employees Union, (Applicant) v. Mohawk College, (Respondent). (*Withdrawn*).

EMPLOYEE STATUS (SECTION 95(2))

1952-80-M: Professional Institute of the Public Service of Canada, (Applicant) v. Professional Institute Staff Association, (Respondent). (*Terminated*).

2421-80-M: Canadian Union of Public Employees and its Local 1701, (Applicant) v. Town of Ganaoque, (Respondent). (*Denied*).

0200-81-M: Professional Institute Staff Association, (Applicant) v. Professional Institute of the Public Service of Canada, (Respondent). (*Terminated*).

0309-81-M: Jewish Family and Child Service of Metropolitan Toronto, (Applicant) v. C. U. P. E., Local 265, (Respondent). (*Withdrawn*).

0348-81-M: Canadian Union of Public Employees, (Applicant) v. Guelph General Hospital, (Respondent). (*Withdrawn*).

0361-81-M: Office & Professional Employees International Union Local 81, (Complainant) v. Hawker Siddeley Canada Inc., Canadian Car Division, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

1606-80-M: International Union of Operating Engineers, Local 793, (Applicant) v. Midwestern Contracting Limited, (Respondent). (*Granted*).

2535-80-M: Ontario Allied Construction Trades Council, Labourers' International Union of North America, Local 506, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondent). (*Dismissed*).

2609-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Local 46, (Applicant) v. The Pipe Line Contractors Association of Canada and Cliffside Pipelayers Limited, (Respondent). (*Withdrawn*).

2833-80-M: Labourers' International Union of North America, Local 506, (Applicant) v. Zentor Construction Limited and Toronto Zenith Contracting Limited, (Respondent). (*Withdrawn*).

0048-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. All Can Plumbing and Heating Co. Limited, (Respondent). (*Withdrawn*).

0192-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Aykroyd Construction 1965 Ltd., (Respondent). (*Granted*).

0263-81-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Aykroyd Contracting Limited and Aykroyd Construction (1965) Limited, (Respondent). (*Granted*).

0378-81-M: Canadian Union of Public Employees, Local 2446, (Applicant) v. F. J. Davey Home, District of Algoma Home for the Aged, (Respondent). (*Withdrawn*).

0466-81-M: Labourers' International Union of North America, Local 506, (Applicant) v. Bestway Masonry Ltd., (Respondent). (*Granted*).

0480-81-M: United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. T. A. Andre and Sons (Ontario) Limited, (Respondent). (*Withdrawn*).

0522-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. John Ball Refrigeration & Air Conditioning Ltd., (Respondent). (*Withdrawn*).

0570-81-M: The Pipe Line Contractors Association of Canada and Cliffside Pipelayers Limited, (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Local 46, (Respondent). (*Withdrawn*).

0588-81-M: International Brotherhood of Electrical Workers Local Union 1788, (Applicant) v. The Electrical Power System Construction Association, (Respondent). (*Withdrawn*).

0616-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Chairman Mills Limited, (Respondent). (*Withdrawn*).

0627-81-M: Lake Ontario District Council on behalf of Locals 1450, 397, 572 and 1071, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Four Seasons Drywall, (Respondent). (*Granted*).

0648-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 26, 666, 681, 1133, 1304, 1747, 1963, and 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Norsan Construction Limited, (Respondent). (*Granted*).

0682-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and Sarnia Construction Association and its Affiliate Ronald Williams Industrial Contractors Inc., (Respondent). (*Withdrawn*).

0715-81-M: Christian Labour Association of Canada, (Applicant) v. Expert Insulation Limited, (Respondent). (*Withdrawn*).

0732-81-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicants). (*Granted*).

0748-81-M: Local 200 of The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Kurt Storm Decorators Ltd. of The Ontario Painting Contractors Association Ontario, Interior Systems Contractors Association of Ontario, (Respondent). (*Granted*).

0779-81-M: Ontario Provincial Conference of the International Union Bricklayers and Allied Craftsmen, (Applicant) v. Orazio D'Alisi Masonry, (Respondent). (*Granted*).

0780-81-M: Christian Labour Association of Canada, (Applicant) v. C. H. Heist (Canada) Limited, (Respondent). (*Withdrawn*).

0801-81-M: United Brotherhood of Carpenters and Joiners of America, Local Union 446, (Applicant) v. Eton Construction Limited, (Respondent). (*Granted*).

0802-81-M: International Association of Heal and Frost Insulators and Asbestos Workers' Local 95, (Applicant) v. Alpine Insulation Limited, (Respondent). (*Granted*).

0814-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Division Nine Interiors Inc., (Respondent). (*Withdrawn*).

0815-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Emcan Interior Systems, (Respondent). (*Withdrawn*).

0816-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. E. Milani Drywall & Plaster Ltd., (Respondent). (*Withdrawn*).

0817-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. North West Wall and Ceiling Systems Limited, (Respondent). (*Withdrawn*).

0818-81-M: Drywall, Acoustic, Lating and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. North York Interior Drywall Systems Limited, (Respondent). (*Withdrawn*).

0819-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. R.D.S. Drywalls & Acoustics Limited, (Respondent). (*Withdrawn*).

0820-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Yorkland Drywall Systems Limited, (Respondent). (*Withdrawn*).

0864-81-M: Construction Workers Association Local No. 53 affiliated with the Christian Labour Association of Canada, (Applicant) v. Wm. Finkle Machine Limited, (Respondent). (*Withdrawn*).

0874-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Johnson Controls Limited, (Respondent). (*Withdrawn*).

0875-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Cascade Mechanical Services Limited, (Respondent). (*Withdrawn*).

0877-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Lake Refrigeration and Air Conditioning Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1221-80-M: Local Union 1256 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Kel-Gor Ltd., (Respondent). (*Denied*).

1639-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 2222, (Applicant) v. Thomas Construction (Galt) Limited, (Respondent). (*Denied*).

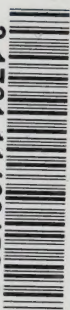
1886-80-U; 2052-80-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. St. Thomas Sanitary Collection Service Limited, (Respondent). (*Denied*).

2596-80-U: Ontario Public Service Employees Union, (Complainant) v. Madame Vanier Children's Services, (Respondent). (*Denied*).

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